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Replies

Uwe Steinhoff

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TABLE OF CONTENTS

I. INTRODUCTION

I thank Larry Alexander for organizing the workshop on the self-defense portion of my manuscript entitled *Just War Theory: Self-Defense, Necessity, and the Ethics of Armed Conflict* at the University of San Diego, where the manuscript to which I respond here was presented.[1] I have meanwhile decided to turn the manuscript into two books, the first provisionally being entitled *Self-Defense, Necessity, and Punishment*; and the second, *Modern Just War Theory*.

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1. Funding was provided by the University of Hong Kong, with one gap being closed by Larry Alexander. I also wish to offer thanks to the secretaries on both sides, that is, to Trang Pham in San Diego and to May Yim in Hong Kong.

Many philosophers who write on self-defense tend to ignore the self-defense discussions offered by legal scholars, and accordingly they often ignore the law or pay insufficient attention to it. In my experience, this attitude stems from a misperception of legal scholarship as some kind of positivistic interpretation of legal documents and as positive law being irrelevant for deciding what the morally right answer to the issues raised by self-defense are. I find this attitude deplorable because legal scholarship, especially in the field of criminal law, is more often than not straightforward moral philosophy; and *criminal* law especially gives expression to widely shared moral intuitions. Thus, the price of ignoring the scholarly debate in criminal law about self-defense might be a certain parochialism wherein authors, who unnecessarily reinvent the stone wheel where others have already offered a racing car wheel, entirely overlook problems that most certainly would be worth of discussion,[2] or misperceive the intuitions of liberal philosophy professors for intuitions widely shared within one's community.

Accordingly, I am particularly pleased to have been given the opportunity to discuss my views with a group of eminent legal scholars and, yes, philosophers, consisting of—in the order of my replies—Samuel C. Rickless, Kimberly Kessler Ferzan, Larry Alexander, Richard Arneson, Peter Westen—who contributed *two* papers—Alec Walen, Michael S. Moore, Saba Bazargan-Forward, Douglas Husak, and Ken Simons. I have greatly benefited from their comments and criticism.

II. REPLY TO RICKLESS

Samuel C. Rickless seems to think that almost every element in my explication of the concept of self-defense is mistaken.[3] Let us have a look:

Rickless is right that, according to me, self-defense is directed against violations of claim-rights.[4] However, he is of the opinion that not just any sort of claim right will do:

> [I]f Jane initiates a threat of violation of my claim to *property*, then surely I do not engage in self-defense if I ward off this threat: what I engage in is defense of my property, not defense of my self. So, for Steinhoff's account of self-defense to

2. A good example is the subjective element of the self-defense justification, which is virtually ignored in the recent philosophical literature on self-defense. Of course, one can reject this element, but to do so one has to provide an argument, and to do that one would first have to realize there is indeed an open question to discuss.

3. A previous version of the chapter Rickless criticizes is available at Uwe Steinhoff, *What is Self-Defense?*, 29 PUB. AFF. Q. 385, 385–402 (2015) [hereinafter *What is Self-Defense*].

4. *See* Uwe Steinhoff, Just War Theory: Self-Defense, Necessity, and the Ethics of Armed Conflicts 22 (2016) (unpublished manuscript) (on file with author).

> match our ordinary language intuitions, the *kind* of attack against which self-defensive action is taken must be restricted to threatened or actual violation of a certain sort of claim, namely the kind of claim that protects interests that are tied very closely to the person—existence, integrity, and freedom.[5]

Actually, if we want to match *ordinary* language intuitions, we should not confuse a reflexive pronoun with a combination of a possessive pronoun and a noun. *Ordinarily*, people say and write "I defended myself," not: "I defended my *self*." There is also nothing *extra*ordinary about saying: I defended myself against their attempt to damage my property. Moreover, even if we talk about defending my *self*—unless Rickless has some psychological, let us say Ericksonian or Meadian,[6] sense of *self* in mind—my self is simply I: if you defend my self, you defend *me*. But if you can defend me—that is, my self—against other people's attempts to steal my property, as you surely can, then I can defend my self against such attempts.

Moreover, it is not clear why Rickless allows for defense of "the kind of claim that protects interests that are tied very closely to the person."[7] It is not immediately clear because it is called *self-defense*, not *interests-that-are-tied-very-closely-to-the-person-defense*, and my integrity and freedom are not me—they are not my self. The obvious reply is: Well, but people would certainly harm your self—that is, *you*—if they cut off your finger or falsely imprisoned you. That is true. But, people would also harm my self—that is *me*—if they stole my money or damaged my property. Thus, however you tweak or twist it, there is no basis for Rickless's claim that self-defense cannot apply to defense of property. *Of course*, I can defend myself against theft and robbery. That *does* fit ordinary language intuitions. I can also defend my self against theft and robbery.

However, German law thinks violations of *mere* contractual rights do *not* constitute an attack.[8] Thus, if you, the milkman, decide not to deliver

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5. Samuel C. Rickless, *The Nature of Self-Defense* 55 SAN DIEGO L. REV. 339, 341–42 (2018).

6. Erickson was a psychoanalyst renowned for viewing identity formation as a process that is located both in the individual and the individual's community. PING DETERS, IDENTITY, AGENCY AND THE ACQUISITION OF PROFESSIONAL LANGUAGE AND CULTURE 38 (2011). Mead is considered the founder of American social psychology and viewed the self as something that is continually produced through social interaction. *Id.* at 40.

7. Rickless, *supra* note 5, at 342.

8. *See* Manfred Pieck, *A Study of the Significant Aspects of German Contract Law*, 3 ANN. SURV. INT'L & COMP. L. 111, 126 (1996) ("If there are failures of performance which do not constitute (1) delayed performance, (2) impossibility or inability to perform, (3) *Fehlen* or *Wegfall der Geschaeftsgrundlage* (non-existence or disappearance of the

the milk, that is not an attack.[9] This makes a lot of sense for civil society, but I think it also makes intuitive sense in the state of nature. I do not think, however, that there is one knock-down reason that accounts for this; there are, instead, overlapping concerns. I have been silent on this issue in the manuscript but will address it in the revised version.

Rickless also takes issue with my claim that self-defense is limited to defense against ongoing or imminent attacks.[10] Regarding my example of a preacher drowning Billy the Baby during the baptism—which I think can hardly be described as an act of self-defense, even if the preacher knows that Billy the Kid will kill him in the far future unless he drowns him now—Rickless begs to differ and asks: "[W]hat else could the preacher possibly plead except self-defense?"[11] Well, under German law he *could not* possibly plead self-defense.[12] He could, however, plead justifying emergency.[13] There is no such justifying emergency statute in the United States—their necessity or choice of evils statutes are not the same—but that is a problem for U.S. law, not for my analysis. To wit, many U.S. states do have an imminence requirement for self-defense, and therefore, the most bizarre interpretive acrobatics are necessary to get a woman off the hook in so-called "battered women" cases.[14] German commentators call these *house tyrant cases*, and, thanks to the justifying emergency statute, they are in no need of any acrobatics.[15]

Rickless also claims that during trial the preacher might say: "So, I figured that the only way to defend myself would be to kill Billy during the baptism."[16] Well, he might say that, but it sounds strange. He could just as well, and less oddly, say: "I figured it was the only way to save my life." There is a time-honored distinction between self-defense and *self-preservation* one should not lose sight of. Consider the following case: The preacher hides from Billy the Kid under some trap door, where, it turns out, there

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basis of the contract), or (4) breaches of a warranty of fitness or a title defect, they are called *positive Vertragsverletzungen* (positive violations of contractual duty).").

9. Unless, for example, you know that my survival or bodily integrity depends on it and you withhold it to kill me.

10. Rickless, *supra* note 5, at 342.

11. *Id.*

12. *See* STRAFGESETZBUCH [StGb] [PENAL CODE], § 32, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0171 [https://perma.cc/9HSZ-WUXJ] (Ger.) (defining "self-defense").

13. *See id.* § 34, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0177 [https://perma.cc/R6KZ-3ZR5] (defining "necessity").

14. *See* Shana Wallace, *Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense*, 71 U. CHI. L. REV. 1749, 1749–51 (2004).

15. *See* JAN ARNO HESSBRUEGGE, HUMAN RIGHTS AND PERSONAL SELF-DEFENSE IN INTERNATIONAL LAW 250 (2017); *see also* StGb § 34.

16. Rickless, *supra* note 5, at 343.

is also a baby. The baby is about to cry, and if Billy hears that, he will find and kill the preacher. The preacher therefore covers the baby's mouth and nose until it is unconscious—which would normally constitute battery. This is not a case of self-defense, certainly not in law. The preacher has, however, a necessity justification here. Now imagine a variation of this example where the baby in question is Billy the Baby himself, transported through time by some cosmic fluke. Would cutting off the baby's air supply now count as self-defense? I do not think so. Self-defense is directed against attackers, and it is Billy the Kid who is doing the attacking here, not Billy the Baby. The mere fact that Billy the Baby is an earlier time slice of Billy does not convert the baby into an attacker. If cutting off the first baby's air supply was not self-defense, cutting Billy the Baby's air supply is not self-defense either; it is self-preservation.

Rickless also objects to my claim that self-defense can only be directed against attacks, that is, given how I understand "attack," against rights-violations stemming from action.[17] He claims that one trapped in an elevator could act in self-defense against a butcher carrying a large knife who suddenly suffers muscle spasms such that the knife might end up in one's body.[18] He adds: "The same would be true if the butcher's primary motor cortex were being electrically stimulated by an evil neuroscientist."[19] In my view, there is an attack in this latter case, with the neuroscientist being the attacker, but not in the case where the muscle spasms are not induced by anyone. Imagine, for instance, the butcher had some kind of electric cutting device strapped to his back that suddenly goes haywire so that the knives threaten to cut me into pieces. Always prepared, I draw my light saber and destroy the device. I think it is odd to say I *defended* myself against the device. Sure, I used force against it, but I might also forcibly open a door to escape a fire, and that does not mean I defended myself against the door—or against the fire, for that matter. If, in contrast, the butcher activated the device to kill me, then my destroying the device would have been an act of self-defense—not against the device but against the butcher. In short, I do not think one can literally *defend* oneself against *accidents*, whether they come in the form of malfunctioning devices or muscle spasms. One can defend oneself against *attacks*, however.

17. *Id.*
18. *Id.*
19. *Id.*

In this context, I must note that I follow Rudolph Carnap's lead as far as conceptual explication is concerned.[20] As I point out, Carnap requires the explicatum of a concept to be *similar*—not equal—to its ordinary language use, and to be precise, simple, and fertile.[21] Rickless correctly surmises I would not "think of conceptual analysis as involving replacement of a Carnapian explicandum by a potentially rather *dissimilar* explicatum that should be useful in *empirical* theorizing."[22] Instead, I think the explication of the concept of self-defense should also be fertile for *normative* theorizing —for example by making conceptual distinctions that have normative relevance—and this interest in fertility has to be weighed against the interest in similarity. Given that I think the butcher case falls under the justifying emergency justification and not the self-defense justification and given that it is also weird in ordinary language—and at the very least not compelling —to say that I defend myself against the butcher's involuntary movements, I can safely stick with my explication of self-defense according to which it is directed against attacks. *Pace* Rickless, there is no "inconsistency."[23] Moreover, my interest in fertility gives additional support to my insistence on the imminence requirement given that, as I argue, the distinction between attacks that are ongoing or imminent and those that are not is normatively relevant.

Next, Rickless argues against my claim that self-defense need not be "aimed at averting or mitigating" *harm*.[24] He attacks my example of the old gunfighter weary of life who secretly hopes to be killed by a young gunslinger but nevertheless fights back each time out of habit or professional ethics.[25] I say the old gunfighter is defending himself although he does not intend to avert harm.[26] Rickless claims it would be "wildly irrational" for the gunfighter to fight back if he intends to be killed.[27] But because I nowhere say he *intends* to be killed but merely that he hopes to be killed, this is neither here nor there.

Rickless also claims the gunfighter might still aim to avert "*harm-tokens*" instead of "*harm-types*."[28] I have argued elsewhere that it is not possible to intend what I called "concrete singular actions," that is actions that are specified down to the last detail—we cannot mentally and thus with our

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20. *Id.* at 1.
21. Steinhoff, *supra* note 4, at 21 n.44.
22. Rickless, *supra* note 5, at 340 n.6.
23. *Id.* at 344.
24. *Id.* at 346.
25. *Id.* at 346–47.
26. Steinhoff, *supra* note 4, at 6.
27. Rickless, *supra* note 5, at 347.
28. *Id.*

intentions so specify an action.[29] For the same reasons, I do not think we can intend to avert harm-*tokens*. And, of course, I do not see why the gunfighter should intend that anyway, as Rickless rightly points out.[30] Yet Rickless says he is "not convinced that shooting at someone merely because one has been paid to do so or because it is habitual to do so under those sorts of circumstances automatically counts as self-defense."[31] He elaborates: "Certainly, we should be able to agree that if the gunslinger's shooting back was merely an elaborate signal to a confederate to leave town, it would not count as self-defense *even if* it resulted in the incapacitation of the gunslinger's attacker and halted the attack."[32] Yet, in my example, the gunfighter "fights back as competently and fiercely as he always does and indeed knows that this will probably stop the attack,"[33] and this is very different from signaling to someone and then accidentally hitting an opponent. Consider a parallel example: Someone gives Alicia a loaded sniper rifle and tells her that if she shoots from a lethal distance at Mircea's head while she has it in her cross-hairs, she will get $10,000, but only if she misses. Whether or not she keeps the head in the cross-hairs can be closely monitored. So, greedy Alicia carefully aims the rifle and shoots, hoping she will miss anyway. She most certainly did not *intend* to inflict harm, for harming Mircea would be counter-productive. Did she attack Mircea? Of course. Shooting at someone's head with a loaded sniper-rifle certainly is an attack, whether you intend to inflict harm or not. But, if you can attack someone without intending to *inflict* harm, why should you not also be able to defend yourself without the intention to *avert* harm? Whence the mysterious difference? If, let us say, Mircea knows he is protected by an impenetrable force field that will reliably divert Alicia's bullet but let his own phaser ray pass, and intentionally stuns Alicia just as she is about to pull the trigger, then, it seems to me, he has defended himself against an imminent attack by preventing it, but he did not do so with the intention to avert harm—he already knew Alicia could not harm him.

Rickless also has a problem with my idea that there can be unintentional self-defense, for example reflexive or instinctive self-defense.[34] Commenting on my spider vs. spider wasp example he claims:

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29. UWE STEINHOFF, ON THE ETHICS OF WAR AND TERRORISM 40 (2007).
30. Rickless, *supra* note 5, at 347–48.
31. *Id.* at 348.
32. *Id.*
33. Steinhoff, *supra* note 4, at 7.
34. Rickless, *supra* note 5, at 349.

> [O]ur descriptive predispositions in these cases are keyed to observable animal *behavior*. And given that we generally take self-defense to involve intentions and beliefs of certain sorts, the most reasonable explanation of our readiness to use the vocabulary of self-defense in describing the spider's activity is that our application of the concept of self-defense is *analogical*. The use of self-defense vocabulary in this case seems no different from the use of words such as *attempt* and *try* to describe the motion of sunflowers or light-sensitive bacteria.[35]

I think this statement is both incoherent and entirely unrealistic. If our "descriptive predispositions in these cases are keyed to observable animal *behavior*," then it can hardly be a "given" that "we generally take self-defense to involve intentions and beliefs of certain sorts."[36] I, for one, think the spider wasp is engaged in *literal* self-defense and so is a rat trying to bite the cat—whatever their "intentions" or "beliefs" might be.[37] There is simply no evidence concerning the language use of ordinary speakers—or narrators in animal documentaries—that would give the slightest credibility to Rickless's claim that "we" use the term self-defense "analogical[ly]" in such cases.[38]

Likewise, referring to another scenario,[39] Rickless actually *admits* to "our readiness to describe Sally as engaging in self-defense when she punches Superman reflexively," but then claims this is "no more than an instance of analogical concept application."[40] Yet, I think most of us are ready to describe Sally as engaging in *literal* self-defense—I certainly am—and Rickless does not show otherwise. Instead of taking the ordinary use of "self-defense" seriously, Rickless seems to project his own technical use of the term onto ordinary speakers, trying to explain away discrepancies by an appeal to "analogical concept application."[41]

Rickless also considers my example where Sally is attacked by someone whom she cannot stop from pushing his knife into her chest after exactly twenty seconds.[42] I argue that even if Sally *knows* that she cannot stop him, her resistance would still count as self-defense, which would show self-defense need not be aimed at averting or mitigating a harm *nor* at averting or mitigating an *attack*. Rickless basically criticizes the example by rejecting its assumptions. He claims she does *not* have "*knowledge* that she will fail to keep the knife away from her body: her assailant may, for all she knows, drop dead of a heart attack before he can press the knife into her flesh, be struck by lightning, or be attacked by a swarm of bees."[43]

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35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* (emphasis omitted).
39. Steinhoff, *supra* note 4, at 8.
40. Rickless, *supra* note 5, at 350.
41. *Id.*
42. *Id.*
43. *Id.* at 351.

Yes, and "for all I know," the desk I am sitting at might be a shapeshifting extraterrestrial anthropologist. I think Rickless is confusing knowledge with certainty here. Knowledge is commonly understood as justified true belief,[44] and it is of course at least *possible* to have a justified true belief and a firm conviction that your attacker is about to push a knife into your body in twenty seconds. But, even then Sally's resistance would intuitively still count as self-defense. However, Rickless thinks:

> Second, even supposing that Sally2 *knows* that she cannot possibly stop the assailant from stabbing her to death, she can still try to mitigate or avert the stabbing. What she *cannot* do is *rationally* try to mitigate or avert the stabbing. What this shows is not that intending to stop or mitigate an attack is *impossible* when the victim knows that the intention will not be fulfilled, but that, under these circumstances, self-defense is *irrational*.[45]

Let us suppose we have two Sally2s: Rational Sally2 and Irrational Sally2. On Rickless's account, Rational Sally2's resistance under these circumstances would not count as self-defense while Irrational Sally2's would. I find this bizarre. In addition, I do indeed think that it is not only rationally but *conceptually* impossible to intend to do something that you *know* you cannot do. Consider the likelihood of this conversation:

> Ernie: I know I cannot jump over the skyscraper, but I nevertheless intend to jump over it now.
> Bert: Nonsense, if you *know* that you cannot do it, you cannot simultaneously *intend* to.
> Ernie: But I am *irrational*.
> Bert: *Geeeeeee*, that is something completely *different*. Then *of course* you can intend to jump over the skyscraper although you *know* you cannot jump over the skyscraper.

I don't think so.

Moving on, I claim that:

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44. Justified true belief plus a variable X, to avoid Gettier problems. Edmund L. Gettier, *Is Justified Belief True Knowledge?*, ANALYSIS, June 1963, at 121, 121. But, that need not concern us.

45. Rickless, *supra* note 5, at 351.

> An act token is self-defense if and only if a) it is directed against an ongoing or imminent attack, and b) the actor correctly believes that the act token is an effective form of *resistance* or the act token belongs to an act type that usually functions as a means to resist an attack.[46]

Rickless thinks the reference to the act type that usually functions as a means to resist an attack is *ad hoc*, but he actually seems to have a problem with the *entire* condition (b) and thinks it is open to counter-examples.[47] He uses his example of Sally3, who mistakes a harmless rock for Kryptonite and ineffectively waves it in front of Superman's face, and states: "[O]n Steinhoff's explication, Sally3's actions are not self-defensive. First, Sally3 does not *correctly* believe that waving the rock in front of Superman's face is an effective form of resistance, and second, the act type of rock-waving-in-front-of-a-face does not *usually* function as a means to resist an attack."[48]

First, if someone throws a hand grenade into a classroom full of school children and intends to kill them all, then his act is certainly murderous, even if the grenade does not go off. It is murderous because he attempted to commit murder, but he did not commit murder; there is a difference between trying and succeeding. Likewise, Sally3's act might be "self-defensive" if this is supposed to mean she intended to defend herself.[49] But on my account she does not succeed. Her act is not *actual* self-defense. Now, when Rickless claims her act is "surely self-defensive,"[50] he might want to say it is surely an act of actual self-defense. But it is not *sure*, I think it is flatly wrong: Sally3 did *not* defend herself against Superman, she only *tried* to.

Rickless, however, prides himself on being "less sanguine about the possibility of making sense of the distinction between trying and succeeding in the case of self-defense."[51] I am a bit surprised by this, for in the past some commentators criticized me because they—mistakenly—thought my account dissolves the distinction between attempted and actual self-defense, so I made sure to emphasize that it does not. And indeed, it should not. Yet, Rickless claims that "it is not *generally* true that there is a difference between trying to do something and doing it," offers "[m]ental actions . . . as the most salient counterexamples to the general claim," and then raises the question of "why we should think that self-defense is any different from these mental actions in this respect."[52]

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46. Steinhoff, *supra* note 4, at 10.
47. Rickless, *supra* note 5, at 352.
48. *Id.* at 353.
49. *See id.*
50. *Id.*
51. *Id.*
52. *Id.* at 354.

An obvious answer to this last question is: because it clearly is. Self-defense is not a mere mental act. First, however, I would like to point out that Rickless actually fails to provide plausible counter-examples. He states:

> I see no daylight between *inferring Q from P* and *trying to infer Q from P*—to try to infer Q from P *is* to succeed in drawing the inference. Similarly, it seems to me that it is impossible to *try* to think of my mother without thinking of my mother.[53]

First, I would assume that trying to infer Q from P means trying to see the logical connection between Q and P—to see *why* P implies Q. And, of course, someone might *think* he has found the logical connection—"I got it!"—when in fact he has not. Second, if Rickless has been adopted without his knowledge, then he might have failed each and every time to think of his mother when he tried to think of his mother. Moreover, even if you were not adopted, someone might give you a mind-altering drug and ask you to think of your mother. But simply thinking *mother* is not thinking *of my mother*, and if I cannot remember her name or conjure up any memories of her, then I would fail at thinking of my mother—this is certainly possible.

Thus, even if self-defense *were* a mental act or *like* a mental act, this would not yet dissolve the distinction between attempting to defend oneself and actually defending oneself. Yet, Rickless claims:

> In these cases, the agents act with the aim of averting or mitigating an attack. This seems sufficient for their acts to count as self-defensive, even if, unbeknownst to them, their beliefs about the effectiveness of those acts are comically mistaken. This should be no surprise, given the central importance of *intention* to the proper characterization of self-defense: if the nature of self-defensive action consists in doing something with a certain intention, and—as is the case with all or most mental actions—trying to intend entails intending, it becomes impossible to make room between acting self-defensively and trying to do so.[54]

Note that Rickless has not provided any argument to actually show that the nature of self-defense does consist in doing something with a certain intention. As far as I can see, he is simply stipulating. Anyway, if this is the nature of self-defense, then Sally2 would defend herself if she just passively lay there thinking of the Easter Bunny in the belief that it will stop her attacker's knife from slowly sinking into her chest.[55] The same

53. *Id.* at 353.
54. *Id.* at 354.
55. *See supra* p. 476.

should be true of other-defense.[56] Thus, if a police officer witnesses a rape, does not move a finger, but instead quietly thinks of his mother intending to thereby magically stop the rape, the police officer would be defending the victim on Rickless's account. While Rickless may deem his account a compelling explication of the concept of self-defense, or of other-defense, I dare predict few others will.

III. REPLY TO FERZAN

Before addressing Kimberly Kessler Ferzan's main criticism, let me note two smaller points. Ferzan says:

> Steinhoff is correct that forfeiture is not reason supplying, but he is incorrect to argue that "liability is no path to permissibility at all." The fact that no right stands in the way of the action certainly matters to how strong the reasons have to be to justify the action.[57]

I myself argue at various places in the manuscript that liability contributes to the justification of self-defense—for example, in the normative structure section and in the section on Quong.[58] So, maybe the formulation I used might be misleading; perhaps what I should have said is not "liability is no path to permissibility at all" but instead "liability by itself never provides a justification."[59] Interestingly, although Ferzan, as we just saw, admits that "forfeiture is not reason supplying" and refers to a recent publication of hers where she has allegedly made "amendments to [her] earlier explication that Steinhoff criticizes,"[60] she still claims in that very same publication that "forfeiture is defeasibly sufficient" for permissibility.[61] Yet, if forfeiture is not reasons-supplying, it cannot even be defeasibly sufficient. Forfeiture is *always insufficient*. That was the gist of my earlier criticism of what I call "rights forfeiture theory,"[62] and because she seems not to have changed her position in this respect, my criticism stands.

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56. If Rickless thinks there is a difference, I would like to know where that comes from.

57. Kimberly Kessler Ferzan, *Defense and Desert: When Reasons Don't Share*, 55 SAN DIEGO L. REV. 265, 269 n.22 (2018) (citation omitted).

58. *See* Steinhoff, *supra* note 4, at 36–47, 171–77.

59. Although, I think a path that only leads halfway to Rome is not really a path to Rome but a path halfway to Rome.

60. Ferzan, *supra* note 57.

61. Kimberly Kessler Ferzan, *Forfeiture and Self-Defense*, *in* THE ETHICS OF SELF-DEFENSE 233, 243 (Christian Coons & Michael Weber eds., 2016).

62. Uwe Steinhoff, Shortcomings of and Alternatives to the Rights-Forfeiture Theory of Justified Self-Defense and Punishment 6 (2015) (unpublished manuscript), https://philpapers.org/archive/STESOA-5.pdf [https://perma.cc/EXR9-GHJS].

Ferzan also claims: "If one is an objectivist, then there is no defensive instrumental good served when defense is futile."[63] I do not see why, nor why that should be relevant. If an objectivist accepts that people simply have a prerogative to defend themselves, where defense also comprises resistance that cannot avert or mitigate an attack or harm—and there is nothing intrinsically non-objectivist about such a view—then they can accept the justifiability of futile self-defense. In addition, Ferzan thinks I am faced with "the problem of what to do when the defensive means available would extend beyond the extent to which the aggressor has forfeited his rights. That is, what may a defender do when the only way to stop an aggressor's pinch is to cut off his arm?"[64] Well, on my account the defender must not go beyond that extent. He can, however, pinch the aggressor—after all, I allow for futile self-defense, as Ferzan acknowledges.[65]

Now to Ferzan's main criticism. She is of the opinion that I am wrong in thinking that most cases of self-defense are both punitive and defensive and in—allegedly—thinking there are only "rare cases in which adding self-defense and punishment can justify inflicting more harm."[66] Note, however, that I actually acknowledge there can be cases where an act that also has defensive effects or purposes but cannot be justified by the self-defense justification nevertheless could be justified as punishment and under appeal to a necessity or lesser evil justification. Ferzan knows that I grant this.[67] Note also that when I was criticizing McMahan's way of adding up "punitive" and "defensive" harms as "odd,"[68] I was really only criticizing McMahan—given McMahan's, increasingly peculiar, account of liability this supposed adding simply cannot work, and Ferzan originally agreed.[69]

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63. Ferzan, *supra* note 57, at 271.
64. *Id.*
65. *Id.*
66. *Id.* at 266.
67. *Id.* at 281 n.88. Note, however, that evidence-relativity has, contrary to what Ferzan suggests, nothing to do with it. My account of self-defense is mixed, and so is my account of punishment.
68. Steinhoff, *supra* note 4, at 13; *see also What is Self-Defense*, *supra* note 3, at 393–94.
69. Namely in a previous draft of Ferzan, *supra* note 57, at 14. She now claims:

> Frowe's friendly amendment to McMahan's view would dissolve Steinhoff's problem that there is no X to add. A is liable to X insofar as X is the amount of proportionate harm that would stop the attack. The problem for B is that she lacks the ability to administer X—that is, the punch in the face.

Id. at 276. That is wrong. Frowe does not provide a friendly *amendment*, rather, she correctly points out that McMahan does not have the problem that two other authors attribute to him: to

So, I do not really think I originally wanted to express the negative view about *adding* that Ferzan ascribes to me, but maybe Ferzan has picked up some subconscious vibe in my text because, as it turns out, I am quite willing—with qualifications to come later—to adopt the view she attributes to me.

What the contentious view is can best be seen after some preliminaries and after considering an example Ferzan provides:

> *Two for the Price of One?* D threatens to punch E on the subway. E can stop D by stomping on his foot very hard with her stiletto heel. Imagine that as she does so, she thinks both that this will serve as effective defense and that D deserves it.[70]

Ferzan invites us to assume that "a heeled foot stomp is proportionate to a punch (X) [and also that] a heeled foot stomp is proportionate to D's desert (X)."[71] And she states:

> I believe it is implausible that when E acts, even if she acts intending to defend and punish, that her act constitutes an act of prevention and punishment simultaneously. Here is a first stab at the reason why this is so: if a desert reason is not necessary to justify an action, that desert reason is not satisfied and will continue to exist. That is, when an action is overdetermined by the balance of reasons, the desert reason remains inoperative.[72]

I think Ferzan is conflating two issues here that need to be separated: a descriptive one and a normative one. On the *descriptive* level, I find it entirely *im*plausible to say that although E "acts intending to defend and punish" and succeeds both in deflecting the harm from her and in inflicting suffering on D, E's act is nevertheless *not* "an act of prevention and punishment."[73] In fact, I find it self-evident that, given Ferzan's own description of the case, this most definitely *is* an act of self-defense and punishment. Thus, I do not think this example—or Ferzan's subsequent discussion—succeeds

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wit, that someone *cannot inflict* harm X on an aggressor does not mean that the aggressor is not liable to that harm. *See* HELEN FROWE, DEFENSIVE KILLING 99–100 (2014). Yet, *pace* Ferzan, that is not the issue in the present context. The problem for the defender in McMahan's example is not that the *defender* lacks the ability to *administer* harm X, but rather that *harm* X lacks the ability to be defensive. Because X is not effective—*ex exemplo*, it would *not* stop the attack—that is the very starting point of the entire discussion there, and certainly *not* open to interpretation—on McMahan's instrumentalist account the aggressor simply cannot be liable to it. So, the problem remains quite undissolved. As Frowe herself says: "Internalists reject liability to defensive harm in cases where . . . even if one used proportionate defensive force, that force would not avert the threat." *Id.* at 98.

70. Ferzan, *supra* note 57, at 277.
71. *Id.*
72. *Id.* at 278.
73. *Id.*

in refuting my descriptive claim that most cases of self-defense are also cases of punishment.

Yet there is still the *normative* issue. Even if one granted that E's act is both punitive and defensive, one could still ask: If the harm inflicted here is *already* justified under an appeal to self-defense, does this mean it does *not count* in calculating how much punishment the offender still deserves? And here the contentious issue about adding comes into view: Ferzan says yes[74]; I say, tentatively, no.

As we already saw, her reason for answering *yes* is: "If a desert reason is not necessary to justify an action, that desert reason is not satisfied and will continue to exist."[75] She provides another case to motivate this judgment:

> Assume I take my child and a friend to a movie and decide to buy them both ice cream afterwards. The reason that justifies this is something akin to *this is a nice thing to do for both of them*. Now imagine my child also got an A on a recent history test and that I always take him for ice cream to celebrate. I think he would have a complaint against me if I said that the post-movie ice cream trip also counted as his deserved reward for his grade. That is, although I had two reasons on that first occasion to get him an ice cream cone, the fact that one of those reasons was sufficient to justify the conduct led to the other reason continuing to exist. He continues to have a desert-based reason to get a second dessert.[76]

This example does not convince me. If the child has no legitimate expectation that, for instance, only the two of them go for an ice cream in celebration or if, for example, the celebrations in the past also included a night out with friends and ice-cream, I do not see how the complaint could be valid. Anyway, examples involving children are problematic, because we react to children very differently than we react to adults. So, consider this example:

> A stranger returns the wallet I lost to me and deserves, as my companion and I know, a $10 finder's fee for it. I am interested in my companion not regarding me as cheap. I give $10 to the stranger.

Here, I have both a desert-based reason and a prudential or self-interest-based reason to give the stranger the money. Let us suppose I actually act on the prudential reason. Do I then have to give $20 to the stranger because the desert-based reason *continues to exist*? That seems counter-intuitive.

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74. *See id.* Of course, she would deny, on the descriptive level, that punishment has been inflicted at all. My point is that she need not deny it, and she could put the first *punishment* in the question in scare quotes.

75. *Id.*

76. *Id.*

The stranger has no complaint. He deserved to get $10 and he got what he deserved.

In addition, Ferzan notes it is not immediately clear which of the two reasons in *Two for the Price of One* is actually operative.[77] Why not the punitive one? Her answer is basically that a private citizen "is ordinarily not permitted to inflict such [punitive] harm [because she] is constrained by her social contract."[78] But, now imagine E is actually *Judge Dredd*.[79] Dredd lives in a society where the heavily armed judges are also police officers and executioners. Would Dredd be justified in foot stomping D twice to give him what he deserves?

My tentative answer is—here comes the qualification I announced above: that depends. While I do not think that everything about proportionality is conventional, I think that part of it is. Societies have some leeway in deciding what is proportionate and what is not, and that is true for punishment as much as for self-defense. Thus, I think if it is fitting for a society that harm inflicted on a wrongdoer in self-defense is subtracted from the harm he or she deserves as punishment, then that is fine. If not, that is fine too. If our societies had judges of the Dredd kind, I would prefer the former option, though.

IV. REPLY TO ALEXANDER

Larry Alexander thinks that with regard to self-defense—or, more precisely, other-defense—*culpability* "is the proper focus," not justification.[80] Given that, as a moral philosopher writing about self-defense, I am *of course* interested in when self-defense is *justified* or *permissible*, culpability is most certainly *not* the proper focus; at the very least it can hardly be the main focus. Why does Alexander think otherwise? He answers:

77. *Id.* at 278.

78. *Id.* at 283.

79. Given the stiletto heels maybe we call him Judge Drag? In any case, Judge Dredd is a fictional character appearing in comic books. Judge Dredd Wiki, FANDOM, http://judgedredd.wikia.com/wiki/Joseph_Dredd [https://perma.cc/WAA6-AJAT]. He is a judicial officer known as a "street Judge" in a dystopian future who is empowered to arrest, convict, sentence, and execute criminals. *Id.*

80. Larry Alexander, *The Need to Attend to Probabilities—For Purposes of Self-Defense and Other Preemptive Actions*, 55 SAN DIEGO L. REV. 223, 224 (2018). Incidentally, for justification allegedly not being the proper focus, Alexander, Kimberly Kessler Ferzan, and Stephen Morse have talked an awful lot about it. *See* LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN J. MORSE, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 108–33 (2d prtg. 2011).

> For the simple reason that if TP [a third party defending another person] takes preemptive action and eliminates the possibility of attack, we will never know whether the 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.[81]

If only it were so simple. First, for reasons that others have already pointed out, Alexander is mistaken in thinking justification is about a better state of affairs.[82] We can be justified in doing something even if it does not lead to a better state of affairs. For instance, maybe humanity, including Brangelina, would have been much happier if Brad and Angelina had stayed together, but that hardly means they were not justified in divorcing.

Second, while Alexander claims "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,"[83] it is in fact mysterious why that should be an aspect of self-defense at all, let alone its most important. If someone starts shooting at me and I then draw my gun to shoot back, I am not eliminating or preempting "the possibility of attack"; rather, the attack is *already ongoing* and I am *reacting* to it.[84] Perhaps Alexander would argue that you defend yourself to avert or mitigate harm—that is, *prevent* harm—but I have argued at length in the manuscript that this is *not* the case: self-defense is not necessarily aimed at the aversion or mitigation of harm.[85] Of course, Alexander can deny this, but the credibility of such a denial would have to rely on conceptual analysis and argument—a mere stipulation that self-defense is preemptive is certainly not enough.

Third, even if self-defense were preemptive action—so what? If, as Alexander says, "[j]ustifications are based on the facts"—by which he supposedly wants to exclude the beliefs or attitudes of the defender—what does it *matter* that "we will never know whether [the] attack and the harm it portends would have occurred"?[86] That does not *rule out* justification as

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81. Alexander, *supra* note 80.

82. *See generally* Mitchell N. Berman, *Lesser Evils and Justification: A Less Close Look*, 24 L. & PHIL. 681, 689–708 (2005).

83. Alexander, *supra* note 80, at 223.

84. In fact, Alexander's talk of a "response" is revealing. *Id.* You cannot *respond* to *future* events or acts, only to past or present ones.

85. Steinhoff, *supra* note 4, at 4–20; *see also What is Self-Defense*, *supra* note 3, at 398.

86. Alexander, *supra* note 80, at 224.

proper focus at all, because as a philosopher—and a legal scholar, legislator, or judge, I would assume—I am of course interested in what those facts are. And indeed, Alexander himself says:

> 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.[87]

Well, clearly, if *justifications are based on facts*, then the God's-eye perspective surely *is* sufficient to assess whether the defender's action was *justified*. So, what else remains to be done? *How* is the uncertainty of the defender relevant? An obvious answer would be: it is relevant for the question as to whether the defender is *excused*. Yet Alexander himself says: "I will not ask whether the defender might be *excused* for acting preemptively."[88] That is, he wants to "*avoid* bringing excuse into the analysis."[89] Yet, if an agent is not justified in killing someone, then the only way of him being non-culpable is to be excused. But because Alexander wants to *rule out* both justification *and* excuse, how can non-culpability, of all things, possibly be "the proper focus"?[90] That seems not to make too much sense.

Moreover, even if we *allowed* excuses into the analysis, the God's-eye view would *still* be sufficient. In fact, how could the God-eyes-view ever be *in*sufficient? Even if we introduced confidence levels or subjective probabilities into the formulation of some guidance about self-defense, God is still much better at assessing TP's confidence levels than TP himself. It is, after all, simply false to think a TP in a self-defense situation will know exactly what his own confidence levels with regard to the factors Alexander mentions are. *Probabilistic self-transparency*, or however you might want to call this, is an illusion.

Thus, the God's-eye view is not only sufficient, but definitely the *best* perspective to *assess* whether an agent is justified—or excused, or X, whatever X might be. However, it would be a big mistake to take that as an invitation to *formulate action-guiding rules* with regard to self-defense

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87. *Id.* at 225.
88. *Id.* at 224.
89. *Id.* (emphasis added).
90. *Id.*

as if the defender *had access* to the God's-eye view. I certainly do not presuppose the defender has such access, contrary to what Alexander rather surprisingly claims: "In the overwhelming majority of Steinhoff's examples, the actors are dealing with certainties regarding self-defense matters."[91] I doubt there is even *one* such example in the manuscript let alone "the overwhelming majority."[92] Alexander seems to be confusing the perspective of the philosopher with the perspective of his cast of characters. Just because a philosopher conjures up a thought experiment involving a spider sitting on a copy of *Beyond Good and Evil*[93] does not mean he attributes to the spider knowledge and certainty that it sits on that book. The same is true for philosophers conjuring up examples involving innocent defenders and culpable attackers.

Now, excuses are *not* action guiding; *justifications* are. Because it is, as I said, a mistake to formulate action-guiding rules with regard to self-defense as if the defender had access to the God's-eye view, theorists who derive their normative conclusions from the stipulation that justification is "based on the facts"—so that the epistemic limitations of the defender are irrelevant for justification—"will fail to provide answers usable in the real world"—to borrow Alexander's words.[94] In contrast, my arguments about necessity, proportionality, the subjective element of the self-defense justification, and the precautionary principle in self-defense are actually all *driven* by the realization that proper action guidance must take the defender's epistemic limitations into account—without selling out to pure subjectivism, thereby confusing justification with excuse. I, therefore, submit that it fares significantly better in terms of action guidance then purely objectivist accounts of justified self-defense.

V. REPLY TO ARNESON

Richard Arneson proposes the following principle of "*Fault Forfeits First*," which he also applies to the case of self-defense: "All else being equal, the morally preferred target for violence directed at undoing or preventing a serious evil or injustice is an agent who is seriously culpable

91. *Id.* at 225 n.5.
92. *Id.*
93. *Beyond Good and Evil* is a book by the philosopher Friedrich Nietzsche. *See generally* FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE (William Kaufman ed., Helen Zimmern trans., Dover thrift ed. 1997) (1886).
94. Alexander, *supra* note 80, at 228.

with respect to that evil or injustice and more culpable than anyone else involved in the situation."[95] He has a very licentious account of what "with respect to" means. To wit:

> In principle, fault forfeits first could identify—as the morally preferred person to die when someone's behavior or movement threatens another with serious harm—a guilty bystander who is ill-disposed to the victim and directs hateful thoughts at her, and who would harm the victim wrongfully if he could. However, this guilty bystander has no action available and hence is neither acting nor trying to act toward the victim at all.[96]

He admits that "[t]his feature of fault forfeits first may strike some as obviously morally outrageous."[97] Well, how outrageous it is depends on what the principle is supposed to imply. Unfortunately, that is not entirely clear. Consider for instance this case:

> *Hospital*: Carl will not get the kidney he needs to survive unless Bill, who is first in the transplantation queue, dies tonight. Bill hates Carl for racist reasons and would wrongfully kill Carl if he could—but he cannot. Carl sneaks over into Bill's room and suffocates him with his cushion.

The name of the principle *fault forfeits first* suggests, of course, that it is a principle about, well, forfeiture.[98] Yet, shortly after introducing this principle Arneson tries to "illustrate the idea" with some examples, among them "*Accommodation*."[99] Here, he says: "In this case I suppose it is morally *permissible* to jump to the niche, killing bystander and saving your life."[100] Given that Arneson explicitly agrees with my observation that "the fact that the Culpable Aggressor lacks a claim right not to be harmed does not mean harming such an individual is morally justified,"[101] the move from forfeiture to permissibility is unwarranted. In any case, if *fault forfeits first* is supposed to also be a principle about permissibility—and Arneson certainly uses it this way in his entire discussion—then it is, indeed, outrageous. While Bill might well have forfeited his right not to be killed by Carl, that does not make Carl's action justified. In fact, legally and morally it seems to be a case of murder or at least manslaughter.

One reason why Carl's action might be unjustified is that he might not know that Bill would kill him if he could. One might argue it is implicitly

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95. Richard J. Arneson, *Self-Defense and Culpability: Fault Forfeits First*, 55 SAN DIEGO L. REV. 231, 235 (2018).
96. *Id.* at 239 n.30.
97. *Id.* at 243.
98. *See id.* at 235.
99. *Id.* at 236–37.
100. *Id.* at 237 (emphasis added).
101. *Id.* at 259.

presupposed in the example that Carl knows this. Yet, if it were presupposed, then Arneson would not need to argue, as he does in Part IV of his paper, that the epistemic limitations of the agent play no role for "evaluative purposes."[102] In fact, however, they do. We can very well ask, for evaluative purposes, whether someone was justified in killing someone else although he did not *know* the objective justifying conditions were given. Another evaluative question concerns *culpability*. If someone does not know the objective justifying conditions are fulfilled, then he might be as culpable—or more so—as other people involved. But then Arneson's "*Guilty Bystander*" example[103] not only fails to demonstrate the permissibility of killing the bystander, it does not even demonstrate that the bystander forfeited his right to life in the first place, because it is possible that the threatened agent, lacking sufficient knowledge about the situation, is at least as culpable as the bystander.

Moreover, even if Carl somehow *knew* Bill would kill him if he could, he cannot know this for *certain*. Throughout my manuscript I argue that epistemic limitations motivate a principle of precaution that also underlies the necessity and proportionality constraints of justified self-defense: by following such a principle, agents reduce the risk of violating the rights of others.[104] I also argued that proportionality constraints are stricter in the case of a justifying emergency than in the case of self-defense,[105] which is directed against imminent or ongoing attacks. Bill, however, is not attacking anybody. Carl would kill him not in self-defense, but in self-preservation. It seems to me that killing a defenseless patient in a hospital to get a kidney which that patient otherwise would get cannot be allowed by morality even if the killer knows that the patient has forfeited his right to life. The risk that he has not—knowledge does not imply infallibility—is too high to justify the killing in a situation like the one described in this example. Arneson himself says: "What triggers forfeiture of moral immunity from being subject to attack is egregious failure to show due consideration for others' legitimate moral rights and interests. Failure to have and show such concern tends to threaten others with receipt of wrongful harm in many situations."[106] It seems to me that Carl indeed does not show enough concern for the rights of others.

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102. *Id.* at 245.
103. *Id.* at 238–39.
104. Steinhoff, *supra* note 4, at 17, 147.
105. *Id.* at 80–81.
106. Arneson, *supra* note 95, at 243 (footnote omitted).

After admitting the mentioned feature of *fault forfeits first* may seem morally outrageous, Arneson declares: "We should not be stampeded by this concern into abandoning fault forfeits first. We should simply recall the examples already considered, especially Accommodation and Guilty Bystander, and consider whether the judgments proposed for these situations are acceptable after reflective scrutiny."[107] That, however, is somewhat curious methodological advice. Arneson basically tells us to be impressed by one set of examples and to dismiss a contradicting set—to which *Hospital* would belong.[108] A better approach would certainly be to try to find a principle or account that does justice to our intuitions in both sets of situations. My intuition in *Guilty Bystander*,[109] however, is that it is *not* permissible to kill the bystander if his throwing snowballs is indeed completely ineffectual. In *Guilty Bystander* the driver has no less reason—Arneson wants to keep all else equal, after all—to believe in the innocence of the bystander than in the innocence of the aggressor[110] and if you are faced with the choice of risking killing either an innocent bystander or an innocent aggressor, then you should kill the aggressor because aggressors forfeit their right against necessary and proportionate defense.[111]

Regarding *Accommodation*,[112] the person in the niche who refuses to get out of the way is thereby attempting to commit murder. He is *attacking* the other person and therefore becomes liable to defensive force on my account, and this force would also be *justified* if it is necessary and proportionate and if the subjective element is fulfilled.[113] My account does *not* have the *outrageous* implications Arneson's account has in cases like *Hospital*, however. Thus, because it has intuitive implications and avoids the counter-intuitive ones, my account is to be preferred.

Let me finally note three smaller points: First, concerning necessity and a potential victim faced with an aggressor, Arneson says: "If parachuting to safety [instead of killing the aggressor] would give her a .999 chance of saving herself and a .001% chance of death, she must take the escape option,"[114]

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107. *Id.*
108. *See supra* p. 489. I could provide many more examples.
109. *See* Arneson, *supra* note 95, at 238–39.
110. In reality he would have more reason to believe in the innocence of the bystander.
111. Of course, not everyone agrees that innocent attackers are liable, but I have argued for this position. Steinhoff, *supra* note 4, at 162; *see also* STEINHOFF, *supra* note 29, at 80–85; Uwe Steinhoff, *Justifying Defense Against Non-Responsible Threats and Justified Aggressors: The Liability vs. the Rights-Infringement Account*, 44 PHILOSOPHIA 247, 248 (2016). And it is certainly the majority view. Moreover, even if one rejects the view that they forfeit such rights, it is difficult to also reject the view that their rights at least become less stringent.
112. Arneson, *supra* note 95, at 237.
113. Steinhoff, *supra* note 4, at 57.
114. Arneson, *supra* note 95, at 353.

even if, I suppose, shooting the aggressor would give her a 0% chance of death. However, I provide an argument against this view:

> [L]et us define a *Type R* attack as an attack where the defender can be pretty much certain to survive if he uses lethal defense against the culpable aggressor but has only a 99% chance to survive such an attack if he uses a taser, and where he only has these two options of defense. Thus, the prohibition on using lethal force here means that one innocent person will have to die for every 100 *Type R* attacks. Hence the question arises: if an innocent defender may kill 100 culpable aggressors in defense of his life, why may he not kill one culpable aggressor in order to have a 100% survival chance instead of only a 99% one? Or, to put it still another way: if one and the same aggressor attacks me every day with a *Type R* attack, this means that the injunction of making allowances for the aggressor will leave him occasionally tasered and me dead for good. It seems that it is actually the innocent person's interests, not the aggressor's, that are discounted here, and this indeed *is* implausible. Thus, from a moral point of view as well the German rendering of the necessity condition is correct in the case of culpable aggressors.[115]

Because Arneson provides no counter argument, I see no reason to accept his position.

Second, Arneson says—using again Helen Frowe's parachuting example: "Culpable Aggressor is attacking [a] victim, who has the options of escaping the attack by leaping to safety or instead shooting Aggressor. She commences shooting. For anyone who adheres to a necessity condition for justified self-defense—as I believe we all should do—Frowe's victim is acting impermissibly."[116] Actually, necessity has nothing to do with it. Shooting the aggressor might not be necessary to save her life, but it is necessary to defend her life—escape is not defense.[117] However, even if you say escape is defense, and that by escaping you defend your life, you most certainly did not defend your right to autonomy or your right not to be bullied into leaving a place you had a right to be. Thus, shooting the aggressor is necessary to defend this right, and if Arneson wants to rule out the permissibility of

115. Steinhoff, *supra* note 4, at 71. I have come across the objection that an account of self-defense that rejects the imminence requirement could argue that defending oneself against the first attack is necessary to defend oneself against the entire sequence of attacks, and thus necessary to avert a risk close to 100%. However, that is wrong, because *that* risk can still be averted when the second attack occurs—or the third, or the fourth, and so on. Moreover, one should also note that killing the attacker on one of the later occasions is *less harmful*. It is certainly mistaken to claim that living a day more or less is morally irrelevant—at least, Western jurisdictions do not deem it irrelevant at all. Finally, my example would still work if instead of talking about one and the same attacker, we talked about *different* attackers.

116. Arneson, *supra* note 95, at 254 (footnote omitted).

117. German law is very adamant about this. *See* Steinhoff, *supra* note 4, at 4–7, 10.

shooting the aggressor, he, therefore, has to do so on grounds of proportionality, not on grounds of necessity.

Third, Arneson claims the *if and only if* phrasing of the following principle "rules out futile self-defense as morally impermissible":

> [I]f and only if someone must die when unjust wrongs are being perpetrated, then provided that any choice to kill targets the same number of individuals, it is morally required that the seriously culpable with respect to this situation, if more culpable than others whose deaths would serve the purpose, be chosen as the targets of violence.[118]

This principle does not rule out futile self-defense because futile self-defense is not all about killing and dying.[119] Arneson interprets "the purpose" as "unjust harm reduction."[120] Yet he provides no argument why that should be the purpose of self-defense. I have argued at length that it need not be.[121] Of course, Arneson offers as "justification" for his principle the allegedly "simple idea that every single person's life is valuable, sacred if you will."[122] But, again, even if we accepted the dogma of the sacredness of even Hitler's life—which I see no reason to do[123]—I am pretty sure that a rapist's skin is not sacred, and therefore scratching it in futile self-defense is, whatever else it might be, certainly not a sacrilege.

VI. REPLY TO WESTEN ON HOHFELD

Peter Westen thinks I misinterpret or misapply Hohfeld in a couple of ways. Let me note that while I think Hohfeld's scheme is analytically enormously useful, it is not Holy Scripture. Thus, I will amend Hohfeld if *that* is useful. Of course, this still makes it necessary to get Hohfeld right. So, let us have a look at Westen's comments in this regard.

Westen lists "seven propositions" that Hohfeld wants to establish and claims I, among other scholars, mistakenly "invoke Hohfeld as authority for assertions that are contrary to propositions 1–7."[124] Given that Westen entitles his paper *Poor Wesley Hohfeld* because he thinks so many people misunderstand Hohfeld,[125] I must reply by saying: "Poor me!" To wit, I deny

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118. Arneson, *supra* note 95, at 260 (emphasis omitted).
119. *See* Steinhoff, *supra* note 4, at 4.
120. Arneson, *supra* note 95, at 260 (emphasis omitted).
121. *See* Steinhoff, *supra* note 4, at 4–7; *see also What is Self-Defense*, *supra* note 3, at 385–87.
122. Arneson, *supra* note 95, at 260.
123. *See* Uwe Steinhoff, *Against Equal Respect and Concern, Equal Rights, and Egalitarian Impartiality*, *in* DO ALL PERSONS HAVE EQUAL MORAL WORTH? ON "BASIC EQUALITY" AND EQUAL RESPECT AND CONCERN 142, 168–70 (Uwe Steinhoff ed., 2015).
124. Peter Westen, *Poor Wesley Hohfeld*, 55 SAN DIEGO L. REV. 449, 450 (2018).
125. *Id.* at 450.

only one of the seven propositions listed by Westen, namely proposition 4,[126] and to do so I do not invoke Hohfeld's authority. Rather, I think Hohfeld is *wrong* on that point.

In any case, more interesting than Westen's sweeping claim about the seven propositions is his more detailed criticism. For example, Westen thinks:

> Steinhoff runs afoul of Hohfeld in attempting to explain when an actor, A, owes *compensation* to a person, B, who possesses a claim-right vis-à-vis A not to be harmed. The answer, Steinhoff argues, depends upon whether B has *forfeited* his claim-right not to be harmed, thereby leaving A with a Hohfeldian liberty to harm B—in which case A does not owe B compensation—or whether B retains a claim-right not to be harmed but A is justified in "*overriding*" it—in which case A escapes punishment but owes B compensation for the harm inflicted.[127]

Why do I run afoul of this? Westen explains "that neither *forfeiture* or *forfeit* figure anywhere in Hohfeld's *Fundamental Legal Conceptions*" and states:

> If Hohfeld were confronted with a case like *A Culpable Aggressor*—that is, a case in which A's jural relation to B changes from A's *having* a claim-right against B to A's *not* having it—Hohfeld would invoke the language of powers and liabilities. He would say that (i) the culpable aggressor's claim-right against the defender not to be harmed has always been subject to a liability on the aggressor's part, a liability to his claim-right being *negated*; (ii) the defender's duty to the culpable aggressor, in turn, has always been subject to the defender's power to negate the aggressor's claim-right; and (iii) the liability and power both became operative when the culpable aggressor wrongly attacked the defender and the defender chose to respond. By virtue of the liability/power becoming operative, the culpable aggressor ceased to have a claim-right vis-à-vis the defender not to be harmed and, consequently—and logically—the defender possessed a liberty-right to harm the aggressor.[128]

Fortunately, we do not need to speculate about what language "Hohfeld would invoke,"[129] for the language he actually does invoke is this:

> [I]f X commits an assault on Y by putting the latter in fear of bodily harm, this particular group of facts immediately creates in Y the privilege of self-defense,—that is, the privilege of using sufficient force to repel X's attack; or, correlatively, the otherwise existing duty of Y to refrain from the application of force to the

126. *Id.*
127. *Id.* at 451 (footnote omitted) (quoting Steinhoff, *supra* note 4, at 36–37).
128. *Id.* at 452–53 (footnote omitted).
129. *Id.* at 452.

> person of X is, by virtue of the special operative facts, immediately terminated or extinguished.[130]

That Hohfeld says "terminated" *or* "extinguished"[131] signals that he is aware of the fact that one can refer, with different *words*, to one and the same *concept*. I, for example—instead of saying, as Hohfeld does, that Y's duty not to use force against X has been *extinguished* or *terminated*—also say that, correlatively, X has *forfeited* his claim right against Y's using force against him. In doing so, I am loyal to Hohfeld's conceptual framework without being fetishistic about his use of words, and that seems rather sensible to me.

Westen also states:

> There is no "alchemy" involved [in such] changes in jural relations. Nor, if the underlying changes are normatively appropriate, does a commentator need "knock-down arguments" to "prove" that one set of jural entitlements have been replaced with their opposites. On the contrary, if, in a jurisdiction's judgment, events render it normatively appropriate that existing jural entitlements be replaced with their oppositions, Hohfeld's conceptions of *powers* and *liabilities* function to conceptualize the normative events that produce the changes in jural relations.[132]

I explicitly say there is no alchemy involved.[133] However, I am doing substantive normative philosophy, not only a conceptual *Glasperlenspiel*, that is, I am concerned with the question as to *whether* "one set of jural entitlements [has] been replaced with their opposites" and thus also with the question as to *whether* events have rendered such changes "normatively appropriate."[134] This question is not answered by saying: "*If* they have, they have."

Westen thinks that not only my use of the word "forfeiture" leads me astray, but also my talk about rights-infringements, and in particular my claim that people whose rights have been infringed are owed compensation.[135] Westen correctly points out that "conceptions of *justifiable infringements* of claim-rights are foreign to Hohfeld" and then explains what "Hohfeld would say" about my pharmacist case—a case of justifiable infringement, on my account.[136] Yet, I respectfully submit that Westen has no idea—nor does anybody else, myself included—what Hohfeld would say about such

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130. WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 32–33 (Walter Wheeler Cook ed., 3d prtg. 1964).
131. *Id.* at 33.
132. Westen, *supra* note 124, at 453 (footnotes omitted) (first quoting Steinhoff, *supra* note 4, at 163 n.472; and then quoting *id.* at 164, n.473).
133. Steinhoff, *supra* note 4, at 163, n.472.
134. Westen, *supra* note 124, at 453.
135. *Id.* at 451–52.
136. *Id.* at 453.

a case because Hohfeld evidently has not given such a case any thought. Others have, and many of them have concluded that such cases give reason to *amend* the Hohfeldian scheme with the concept of *justifiable infringement*.[137] There is, after all, no reason not to improve on conceptual schemes.

Westen also reproaches me with the mistake of assuming "Hohfeld conceptions are *normative constraints* on the normative relations that jurisdictions may wish to establish through law"[138] and claims:

> Hohfeld would bar compensation, Steinhoff says, because by virtue of the culpable aggressor's losing a Hohfeldian claim-right that the defender not harm him, the defender possesses a liberty to harm him, and, by virtue of possessing a liberty-right to harm the aggressor, the defender cannot be required to compensate him.[139]

First, I am not aware of saying this anywhere,[140] nor do I make the mistake Westen is accusing me of. Again, I am doing substantive moral philosophy, not mere conceptual analysis. Thus, I do not deny the conceptual possibility within Hohfeld's framework of compensating someone for what you were at liberty to do to him; I just deny that this makes moral sense. Conversely, Hohfeld's conceptual scheme also does not imply that you owe compensation even to a person whose rights you have *violated*. *Conceptually*, one has nothing to do with the other. Yet, in discussing the consequences of rights-violations, Hohfeld says:

> [I]t is clear that if B commits a destructive trespass on A's land, there arises at that moment a new right, or claim, in favor of A,—i.e., a so-called secondary right that B shall pay him a sum of money as damages; and of course B comes simultaneously under a correlative duty. Similarly if C commits a battery on A . . . .[141]

Hohfeld knows very well that this is not *clear* on conceptual grounds—this is his very point in the passage the quote is from. Thus, Hohfeld does not make an analytical observation here, but a *substantive* legal claim, namely that law—or at least sensible law—requires A to compensate B for A's violations of B's rights. Likewise, I make the substantive moral claim that A owes B compensation for even justified infringements of B's rights. Making such claims does not involve confusing analytical distinctions

137. *See, e.g.*, Andrew Botterell, *In Defense of Infringement*, 27 L. & PHIL. 269, 269–74 (2008).
138. Westen, *supra* note 124, at 454 (emphasis added).
139. *Id.*
140. I would like Westen to provide the quote where I allegedly say it.
141. HOHFELD, *supra* note 130, at 101.

with normative constraints—I am not more confused about these things than Hohfeld.

Westen, however, repeats the charge that I take Hohfeld's analytical concepts as constraining "jural relations as jurisdictions may wish to establish"; quotes me saying that "whether Hohfeldian rights are violated or Hohfeldian duties are discharged is an *objective* matter (for most rights or duties)"; and states that my alleged fears that Hohfeld prejudges the question as to whether justification is objective or subjective are misplaced.[142] Yet contrary to Westen, I am nowhere "discussing whether Hohfeld implicitly has a position on whether justification is subjective rather than objective in nature,"[143] and I can hardly be of the opinion that Hohfeld's scheme would *conceptually* make rights and duties an objective—or objectivist—matter if I say "for *most* rights and duties." If it were a conceptual matter, it would have to be the case for *all* rights and duties.

On a minor point, Westen quotes[144] me saying this:

> Even though it seems too strong to say that the falling man is *violating* the right of the other person (perhaps precisely because we associate violations with agency), he is nevertheless posing an unjust threat. People . . . have a duty towards others not to pose unjust threats to them . . . . [T]he falling man is not discharging his duties towards the man standing below . . . .[145]

And then he says: "To [Hohfeld], it is *conceptually impossible* for A to fail to fulfill a duty to B unless A also violates B's claim-right because claim-rights and duties are 'correlatives.'"[146] Westen is right, of course, but as the quote shows, I am not talking about Hohfeld's language use here but about *ours*.[147]

Westen is right when he claims that I need to be more precise when talking about property and property rights.[148] Point taken.

Part V of Westen's paper is entitled "Hohfeld's Proposed Conceptions are *Comprehensive*."[149] Many of the disagreements—also those in some of the following sections—between Westen and me seem due to Westen believing in this comprehensiveness, while I do not. To wit, against my claim that the normative structure of self-defense comprises not only a liberty and a claim-right, but also a prerogative, Westen asserts:

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142. Westen, *supra* note 124, at 457.
143. *Id.* (emphasis omitted).
144. *Id.* at 456.
145. Steinhoff, *supra* note 4, at 164.
146. Westen, *supra* note 124, at 456.
147. However, I will add a footnote in the revised manuscript to avoid here any misconceptions in this respect right from the start.
148. *See* Westen, *supra* note 124, at 459.
149. *Id.*

> A's liberty-right vis-à-vis all persons—including the state—to defend himself means that no one can rightly claim he is *wrong* to defend himself; and A's claim-right vis-à-vis all persons—including the state—to defend himself means that no one may *interfere* with his liberty-right to defend himself.[150]

I, of course, think that a liberty against all persons—including the state—does not by itself amount to a *permission* or *justification*, and I argue that certain peculiarities of *permissible* self-defense necessitate the invocation of what I call an act-specific, agent-relative prerogative. Thus, Westen is missing the point when in reply to my question regarding the Norbert–Catherine hypothetical—Westen quotes it: "Is it really so clear that Catherine may kill him?"—he states that under certain conditions "it *is* clear that Catherine has a liberty-right to kill Norbert."[151] Maybe, but my *may*-question referred to a permission, not a liberty.

Westen rejects this distinction between liberties vis-à-vis everyone and permissions. He states: "[I]n Hohfeld's taxonomy, [a multital liberty] is a 'permission' of a person that is binding on everyone else."[152] Well, regarding the quote Westen refers to here,[153] Hohfeld actually equates—via the quote of justice Adams—a *license* with a permission and explicitly *distinguishes* a license from a privilege—liberty-right—and therefore it is rather odd that Westen adduces this text passage in support of the claim that a multital *liberty* is a *permission*. Be that as it may, the only place where Hohfeld *himself*—that is, outside of quotes—uses the term *permit* in *Fundamental Legal Conceptions* is this one:

> A rule of law that *permits* is just as real as a rule of law that *forbids;* and, similarly, saying that the law *permits* a given act to X as between himself and Y predicates just as genuine a legal relation as saying that the law *forbids* a certain act to X as between himself and Y.[154]

Note, first, that Hohfeld does not use *permit* here as referring to a liberty towards *all* persons. He clearly simply uses it as referring to a liberty between *two* persons. Second, note that this is extraordinarily convoluted. That is not how people talk. Nobody says, for example, "Catherine is permitted between her and Walter to take his book," or "Mommy permitted me

150. *Id.* at 461.
151. *Id.* at 464.
152. *Id.* at 466.
153. *See* HOHFELD, *supra* note 130, at 50 ("A license is merely a *permission* to do an act which, *without such permission*, would amount to a trespass . . . .") (quoting Clifford v. O'Neill, 42 N.Y.S. 607, 609 (1896)).
154. *Id.* at 48, n.59.

between you and me to take your book." That is not proper English. It appears to me, therefore, that Hohfeld is missing something by trying to put a permission into the strait jacket of his allegedly comprehensive scheme. Moreover, the alleged comprehensiveness of Hohfeld's scheme refers to what he calls "jural relations"[155]—but in my view a permission is no relation at all.

Thus, even if everyone in the world—including every state, and including Norbert, of course—had said to Catherine, "Sure, kill Norbert, we waive any right we might have against you not to kill him," then it seems still morally absurd to me that Catherine would now be *permitted* to kill him for the mere fun of it—"I just want to see how his head bursts when I smash it in with my hammer." She just *is not* permitted to kill him for the mere fun of it; and this lacking permission is not a relation *toward* him but a moral demand *with regard to him*. Even if everybody had waived their rights against you killing an innocent person, that does not yet give you a permission or justification to kill that person only because you feel like it. This seems to be a feature of morality that cannot be captured with Hohfeld's scheme—and just ignoring this feature will not do.[156]

Finally, Westen at times alleges that I might "conflate[] law with moral[ity]."[157] I do not think I do, but Westen sometimes fails to realize that certain philosophers apply—without thereby confusing anything—moral arguments in a legal context or make moral arguments with legal examples. To wit, Westen thinks that I invoke "a flawed argument by Sanford Kadish" by claiming that if the right to self-defense were a mere liberty-right this could not explain why we would deem it wrong of the state to *prohibit* self-defense.[158] Westen explains: "Kadish and Steinhoff cannot criticize a Hohfeldian liberty as a ground for B's self-defense by reflecting upon how one would feel if the state prohibited B from defending himself because,

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155. *Id.* at 65.

156. I actually think it is also a feature of law. Note that Westen often talks of a "liberty toward the [state]." Westen, *supra* note 124, at 466. However, such a construct appears nowhere in Hohfeld. *See generally* HOHFELD, *supra* note 130. I think it is quite possible for the state to prohibit some behavior without creating a *duty towards* anyone to abide by this prohibition. Consider a company, instead of a state. The company might have as some of its rules: "If the employer violates the company's property rights, the employer owes the company compensation." Another rule could be: "Do not steal from the company." On one occasion the company waives its claim-right against others not to take its property because if it did not, the evil villain would destroy the whole company. In this scenario, if someone stole from the company, he would not violate its rights, but he would still violate the prohibition against stealing from the company.

157. Westen, *supra* note 124, at 465.

158. *Id.* at 462.

if the state prohibited B from defending himself, B would *lack* rather than *possess* such a liberty."[159]

Westen misunderstands Kadish's argument. Here is Kadish: "Suppose, for example, the law did prohibit defensive killings. One's sense of the matter is that such a law would be unjust. But the forfeiture theory, as far as it goes, would not impugn such a law or explain why it would be wrong."[160] Yes, in Hohfeld's scheme, the state's prohibiting self-defense would mean that people lack the *legal* liberty to defend themselves. They still would have, says Kadish—and I—the *moral* liberty to defend themselves, however. Yet, this moral *liberty* by itself cannot explain why the state would *morally wrong* people by prohibiting self-defense, that is, why such a law would be *unjust*; in contrast, the *moral* claim-right against others, including the state, that others not interfere with the exercise of one's moral liberty to defend oneself does explain that.

In sum, I think, *pace* Westen, that I make good use of Poor Wesley's conceptual scheme; and I can do so partly because I allow myself to still look beyond it.

VII. REPLY TO WESTEN ON "UNWITTING JUSTIFICATION"

The issue between Westen and me here is how to treat unwittingly "justified" attackers. It is important, however, to note where *exactly* the issue lies. Westen claims "that the dispute between objectivists and subjectivists is not about *whether* such actors [namely unwittingly "justified" attackers] should be punished but about *what*, as between attempt and completed crimes of harm, they are most appropriately punished *for*."[161] Yet Westen is well aware that at least *this subjectivist*—that is, I myself[162]—has no particular problem with both Jill and Jill-2[163] being charged merely with attempted murder. Therefore, it is strange that he repeats this false claim. Maybe he thinks that at least pure subjectivists—unlike those who have a mixed account —simply *must* have a problem with both Jill and Jill-2 being charged merely with attempted murder. But that is

159. *Id.*
160. Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871, 884 (1976).
161. Peter Westen, *Unwitting Justification*, 55 SAN DIEGO L. REV. 419, 425 (2018).
162. Although I do not see myself as *subjectivist* anyway because I defend a mixed account.
163. Westen, *supra* note 161, at 424–25, 443. Jill-2, unlike Jill, resides in a jurisdiction that "defines justification objectively." *Id.* at 424.

simply not true; one can be a subjectivist about justification without being a subjectivist about murder. In any case, and to avoid misunderstandings, let me repeat what I say in the manuscript on this point:

> One interpretation [of the anti-objectivist criticism] would be that if one has *actually killed* Earl, then one cannot say that one only *attempted* to commit murder—after all, the killing of Earl was successful. However, this depends on how one understands murder. On my account . . . Earl has forfeited his right not to be killed. And if one defines murder in such a way that by definition it involves the killing of someone who has the right not to be killed, then killing Earl would not be murder. It would, indeed, only be attempted murder (because Jill attempted to kill someone of whom she had to assume that he indeed had a right not to be killed, but her assumption was wrong.).[164]

So, my misgivings about objectivism lie elsewhere, and on the same page I explicitly say where:

> While it is indeed completely consistent, given a suitable definition of murder, to say that Jill's successful killing of Earl was only *attempted* murder, it is *not* consistent to say that Jill's killing of Earl was *both* justified *and* unjustified. Thus if Jill's killing of Earl was *attempted murder*, and we deem attempted murder to be unjustified and impose criminal (and moral) liability for it on the act's perpetrator, then we cannot simultaneously say that the killing of Earl was justified self-defense. One and the same act cannot be simultaneously unjustified attempted murder and justified self-defense.[165]

Because the attempted murder and the actual killing are the same act, they cannot have different properties. In fact, because they both produce the same net benefit they cannot impose criminal liability on the agent, if, as Paul Robinson claims, the production of net harm is a prerequisite of criminal liability.[166]

To the passage just quoted—which he also quotes—Westen answers this:

> It is a *category mistake* to think that criminal attempts, once they are complete, are acts to which justification and lack of justification apply. Justification and the lack of it apply to offenses that are framed in terms of *prima facie* harms. Justification, and the lack of it, come into play after an actor inflicts or risks such a *prima facie* harm, and does so to determine whether the harm he inflicted—or believed he was inflicting—was a harm the state does, indeed, wish to prevent, all things considered. In contrast, criminal attempt is not a crime of *prima facie* harm. It is a crime of intent of which the so-called *act* of attempt is merely constitutive evidence.
>
> . . . If what a person intends to do is justified, a person is not guilty of attempt; if what a person intends to do is not justified, the person is guilty of attempt, provided the person engages in a requisite act and has the requisite mens rea

164. Steinhoff, *supra* note 4, at 140 (footnote omitted).
165. *Id.*
166. *See id.*

> regarding lack of justification. Thus, contrary to Steinhoff, there is no such thing as a *justified attempt*.[167]

Note that, in the penultimate sentence of this quote, Westen suggests an approach that I explicitly discuss in Section 2.2. of "The Subjective Element" chapter, namely the "culpable right action" account.[168] However, I simply do not think this account is a reasonable interpretation of attempt liability. Rather, it is something completely different.

So, let us have a look at Westen's comments on attempt liability. To begin with, to say attempt is "a crime of intent"[169] is mistaken. I have omitted the footnotes of the quote, but it is worth mentioning that after "constitutive evidence" Westen originally added a footnote where he refers to the Model Penal Code as saying that "[a]n act of attempt can be '*anything*' that a person does or omits to do . . . that strongly corroborates his criminal intent."[170] Westen, rather surprisingly, seems to think the MPC's position supports his view, but of course it contradicts it. The MPC says that an attempt *is* what a person *does* or *omits* to do, it does *not* say that it *is* an intention.[171] And indeed Westen himself admits that to be guilty of attempt there must be "a requisite act."[172] Without such an act there can be no crime. Of course, there must also be a mental element, but this *mens rea* requirement is something that attempts share with other criminal acts, which is not particularly surprising given that attempts *are* acts.

Moreover, I am criticizing Robinson and claim his account is incoherent, and because Westen says he has "always found Paul Robinson's position so compelling,"[173] I would assume he is trying to defend Robinson against my criticism here. But then he should consider what Robinson is saying, and not in defense against my *incoherence* charge introduce an account of attempt liability that is actually *alien* to Robinson. To wit, Robinson says:

> It has been suggested, for example, that inchoate offenses such as conspiracy, solicitation, and attempt are by definition crimes from which no ultimate harm results—in other words, punishment is imposed for intending to do harm or for creating a risk of harm. I will contend, however, that the inchoate offenses do not punish bad intent evidenced by overt acts, but rather punish conduct which is

167. Westen, *supra* note 161, at 438.
168. Steinhoff, *supra* note 4, at 145–50.
169. Westen, *supra* note 161, at 438.
170. Peter Westen, Unwitting Justification (2018) (unpublished draft) (on file with author).
171. *See* MODEL PENAL CODE AND COMMENTARY § 5.01(1) (AM. LAW INST., Official Draft and Revised Comments 1985).
172. Westen, *supra* note 161, at 438.
173. *Id.* at 421.

> harmful to society in a way apart from the harm which might have resulted had the actor's intent been fulfilled. The harm is intangible in character, and society is its object. Inchoate offenses not only create a risk of harm, they are harms in themselves.[174]

Evidently, Robinson does not share Westen's interpretation of attempt liability at all. Consequently, my critique of Robinson's objectivism stands unrefuted.

Moreover, Westen's interpretation is strange even in the light of his own Platonic account of the distinction between attempt liability and the completed crime. He states:

> Society should reduce penalties for failed impossibility attempts, [Plato] says, not out of sympathy or pity for failed attempters or because society believes them to be less deserving of blame and suffering. Instead, he notes, society should reduce penalties for failed attempts on *its own* account: society should reduce such penalties because society itself experiences—and *ought* to experience—different emotional reactions to failed attempts than to successful attempts, and because society's public punishments ought to *express* those different reactive emotions.[175]

That sounds quite plausible. What is not plausible, however, is to then go on and throw attempts and intentions into the same basket. Looking at Francis from 100 meters distance and *intending* to cut off his head is one thing; *attempting* to cut it off by swinging one's machete and just barely missing his neck is another thing; and *actually* cutting off his head is *still* another thing. It seems to me that society has good reason to be even *more* "relieved"[176]—to use Westen's expression—when the threshold from intention to attempt is never crossed in the first place than when it is. Should we not also express our different reactive emotions to attempts on the one hand and mere intentions on the other? If so, then one should not construe attempt liability as intent liability.

Let us also have a look at Westen's subsequent claim that:

> If what a person intends to do is justified, a person is not guilty of attempt; if what a person intends to do is not justified, the person is guilty of attempt, provided the person engages in a requisite act and has the requisite mens rea regarding lack of justification. Thus, contrary to Steinhoff, there is no such thing as a *justified*

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174. Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite of Criminal Liability*, 23 UCLA L. REV. 266, 269 (1975) (footnotes omitted). Westen claims:

> Steinhoff relies on Robinson's statement to argue that, if attempts do indeed inflict harm, they should be treated like crimes of *prima facie* harm and, therefore, once committed, be assessed in light of any alternative harms that would have occurred in their absence, in order to determine if the attempts are justified.

Westen, *supra* note 161, at 438. Actually, I do nothing of that sort; I simply rely on the Robinson quote to show that he, unlike Westen, does not take attempt liability to be mere intent liability. I think the quote speaks for itself.

175. *Id.* at 427 (footnotes omitted).

176. *Id.* at 428.

> *attempt*. A person who possesses the requisite intent and acts on it is guilty and ought to be punished, and to ask thereafter whether the attempt is justified or unjustified is meaningless.[177]

I beg to differ. Imagine the sadistic villain Scarlet credibly and truthfully threatens poor Kevin as follows: "If you do not attempt seriously to steal the Matisse from the museum, I will explode an atomic bomb in New York. And if you actually succeed in stealing the Matisse, I will do so too. So, your only hope is that the attempt gets thwarted. But you know I can see if you do not try hard." Kevin's best bet to steal the Matisse is by sneaking into the museum's post office and changing the address on the envelope in which the Matisse has been put to send it to the art restorer. Kevin does that. The only way to leave the museum is via a Star Trek transporter, which will transport him into an isolation chamber where he has to remain for a week without any possibility of escape or communication. The envelope, however, would only need a day to arrive at Kevin's house. Kevin intends to keep the Matisse if he gets it and New York is destroyed—which he hopes will not happen. Thus, he really does *intend* to steal it although he *hopes* not to succeed. Moreover, once Kevin has been transported to the isolation chamber his *attempt* is completed. It is out of his hands now.

If now Kevin attempts to steal the Matisse, he is, on Westen's account, guilty of attempt, for what he intends to do is not justified—it would lead to the destruction of New York. But that is intuitively clearly the wrong result. Merely attempting to steal the Matisse *is* justified—it will reduce net harm—while actually stealing the Matisse is, on the objectivist account, not justified—it will lead to net harm. Now, consider a variation of the case: *Unbeknownst* to Bob—who intends to steal the Matisse—Scarlet will destroy Hong Kong if he does not attempt to steal the Matisse from the museum and also if he succeeds in stealing it. Bob and Kevin intend to do the same thing, so it would seem that Westen would have to hold both Bob and Kevin liable. My account—in which knowledge is an element of the justification—in contrast, can distinguish the two cases in the right way and need not help itself to deeper motivations or meta-intentions or other entirely unnecessary complications: Kevin is *not* liable and Bob *is* liable because Kevin's attempt to steal is justified while Bob's is not.

I think this is pretty much a knock-down counter-example to Westen's argument. In fact, how knock-down it is can be seen by Westen's comments on it. To wit, he repeatedly claims I reason "that Kevin satisfied the elements

177. *Id.* at 438.

of attempting to commit a theft" and that I *base* my argument on this assumption.[178] That is correct, but hardly amounts to a counter-argument. Given that Kevin clearly *does* attempt to commit theft, I can rather safely base my argument on this fact. Westen also says, "[g]iven Kevin's grim alternatives, it can hardly be said" that "meticulously taking the multiple necessary steps on his part to complete the theft . . . . was the wrong course of action."[179] Yet Westen rather astonishingly thinks that by making this statement he is somehow contradicting or even refuting me. Unfortunately for him, he is not, because *I say exactly the same thing*. "Meticulously taking the multiple steps that were necessary on his part to complete the theft," after all, *is* Kevin's attempt to steal the Matisse. So, if that is justified, then an attempt can be justified. However, there is a difference between meticulously taking the multiple steps that were *necessary* on Kevin's part to complete the theft and doing things that are *sufficient* to complete the theft—there is a difference between trying and succeeding. And my point is precisely that an objectivist would have to say that merely trying to steal the Matisse is justified while actually stealing it is not, because the former will save New York and the latter leads to its destruction.[180] So far, as we have seen, Westen has said nothing that would undermine my point; in fact, what he is saying unwittingly supports it.

In the paragraph from "Again, Steinhoff" to "can justify it" Westen simply *repeats* his claim that attempts cannot be justified.[181] However, my hypothetical shows otherwise, and simply insisting on the disputed claim will not do. In fact, Westen does not completely address my example anyway: the force of the example lies not only in the distinction between Kevin's justified attempt to steal and Kevin's unjustified actual stealing but between Kevin's justified attempt to steal and *Bob's unjustified* attempt to steal. I can straightforwardly explain this difference in liability between Kevin and Bob by appeal to the knowledge requirement—as easily as I can explain the liability of Westen's shopkeeper.[182] Because I can explain this, Westen's shopkeeper example is no challenge to me. Conversely, however, Westen has still given us no explanation as to where the difference between Bob's and Kevin's

178. *Id.* at 441; *see also id.* at 441 n.67.
179. *Id.* at 440.
180. Incidentally, Westen seems to have difficulties in distinguishing between the attempt to steal and actually stealing. To wit, he says that "Kevin chose to steal—in lieu of pretending to steal—because he thought stealing maximized his chances that the theft would be thwarted." *Id.* at 447, n.67. However, *stealing* is to *commit theft* while *an attempt to steal being thwarted* means one did *not*—on this occasion—commit theft. Thus, while *attempting* to steal is a necessary precondition for the possibility that the theft will be thwarted, actually *stealing* means the theft will definitely not be thwarted.
181. *Id.* at 441.
182. *See id.* at 441–42.

liability—and there clearly is a difference—is supposed to come from if, as Westen claims, attempt liability is present wherever someone intends—as do *both* Kevin *and* Bob—to do something unjustified.[183] In fact, Westen does not even *try* to explain this difference in liability between Kevin and Bob, mentioning poor Bob not even once.[184] Therefore, my challenge to Westen remains unrefuted.

Let me jump for a moment to the end of Westen's paper. I complain about objectivist accounts not providing proper action guidance. To repeat part of the quote that Westen also adduces:

> [I]f a proponent of this view is asked by someone: "I would like to go into a full theater and shoot randomly at the guests, is that permissible?", then on pain of inconsistency the proponent would have to answer: "Well, that depends on who you will hit. If you hit people like Earl (or Hitler) it's fine, otherwise not." . . . These answers, however, would certainly not be given by ordinary speakers, that is, by speakers who understand what terms like "permissible" and "justified" mean.[185]

It would therefore explain a lot if Westen did not understand what *permissible* and *justified* mean. That he indeed might not understand is suggested by his reply, to wit:

> A Platonic objectivist envisages the very same action guidance as Steinhoff because, like Steinhoff, he assesses a person's criminal desert by the wrong that the person *believes* or *ought to know* he is in fact committing, not by harms that result from his fully acting on his beliefs. A Platonic objectivist would give the . . . shooter the very same warning that Steinhoff would give him. They would both warn him, "Do not try to kill people whom you believe or ought to know you are unjustified in killing."[186]

This is flatly wrong. Westen confuses *action guidance* with the *assessment of a person's criminal desert*. However, these are not the same. Justification and permissibility speak to the former, culpability to the latter. Given that on Westen's account the random shooter is *justified* as long as, out of pure blind luck, he hits only the right people, objectivism definitely does *not* tell them, "*Do not* try to kill people whom you believe or ought to know you are unjustified in killing."[187] Rather, it tells them: "You may go ahead in trying to kill people you believe to be unjustified in killing, as long as

183. Like committing a theft that will lead to the destruction of a city.
184. *See generally* Westen, *supra* note 161.
185. Steinhoff, *supra* note 4, at 154–55.
186. Westen, *supra* note 161, at 446.
187. *Id.* (emphasis added).

you are lucky enough to end up killing the right people." And that *is not* proper action guidance—as even Westen must feel, otherwise he would not—however incorrectly—claim that his objectivism gives the same action guidance as my mixed account. To be sure, due to Westen's—mistaken, as we saw—account of attempt liability, his objectivism would *also* tell the shooter that he would still be *guilty* of attempt liability if he *justifiably* shot into the crowd without fulfilling the knowledge requirement. But telling the shooter *that* is *not* telling him what to *do*. It merely tells him what he will *be*—namely, guilty. Thus, a potential shooter getting Westen's verdict regarding attempt liability can still rightly complain: "I didn't ask you whether I would be guilty or not. I asked you what I may or may not do. In fact, I am quite willing to sacrifice my innocence for doing the right thing. So, may I shoot them or not?" And again, objectivism's answer to *this* question is not helpful. It is *not* proper action guidance.

Finally, I would also like to point out that Westen does not address my criticism of Robinson's pseudo-objectivist account of the justified arrest of innocent people.[188] If objectivism does not lead to the right results there, there is no reason to accept it at all. Thus, I think my criticism of objectivism withstands Westen's arguments.

Let me now return to the already mentioned "culpable right action" account.[189] In that context I advance the argument that objectivism makes justified self-defense practically impossible. I say:

> [I]t is a simple fact of physics that . . . if Jill had fired a shot at a certain time *t* while holding her weapon in a certain position *p* the bullet of her gun would have struck the bullet coming out of Earl's gun in midair and deviated it in such a way as to save the life of Earl's innocent rival. . . . [T]hus it was objectively unnecessary and unjustified for her to kill Earl.[190]

Of course, she does not *know* how to do that, but that should not be relevant for an objectivist. For objectivist justification, it simply does not matter what the agent knows. So much the worse for objectivism.

Westen is not convinced by my argument. He states:

> Steinhoff's argument suffers from two problems that, I believe, are fatal to his position: (1) his critique, if valid, applies as much to his own theory of justification as to objective justification, thereby producing the *reductio ad absurdum* that, regardless of which theory one adopts, justified self-defense hardly ever obtains; and (2) his critique is premised on an erroneous notion of *necessity* for purposes of objective justification.[191]

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188. *See* Steinhoff, *supra* note 4, at 151–54.
189. *See supra* p. 501.
190. Steinhoff, *supra* note 4, at 148.
191. Westen, *supra* note 161, at 443.

Yet, Westen realizes I have "a response" to the first charge.[192] Indeed I do. Contrary to what he suggests in the quote, I have argued at length—precisely *against* objectivist accounts, among others—for a very *lenient* interpretation of the necessity requirement. Thus, my argument in the *How the Purely Objectivist Account Makes Justified Self-Defense Practically Impossible* section of my manuscript is that an *objectivist* account *cannot* adopt such a lenient interpretation of the necessity requirement, while my mixed account can and does.[193] To wit, Phillip Montague, an objectivist, seems to adopt what I call the formulaic interpretation of necessity,[194] namely the "use *literally* the least harmful means" interpretation.[195] With regard to the cowboy example in the necessity section,[196] he is indeed of the opinion that the cowboy shooting instead of saying "Boo" would be unjustified although the cowboy could not possibly know that saying "Boo" will save him.[197] In the section under discussion now I only take this up a notch, showing that the formulaic interpretation leads to counter-intuitive results not only in weird hypotheticals, but in *all* cases, including the most mundane cases of self-defense. Thus, while I think Montague's account of necessity is wrong, I think he is consistent as an objectivist—he also rejects a probabilistic approach[198]—the formulaic account seems to be the only account an objectivist can accept. Likewise, I do not see how a consequentialist like Hurd could accept another account—I took her to be talking about the *actual* best consequences, not about *probabilities*.[199]

Yet, Westen does invoke probabilities. He states, and I quote him at length:

> The appropriate metric for objective justification is not an *ex post* measure of the mildest act that it is *theoretically possible* for Jill to have performed, however infinitesimally small such possibilities might be. It is an *ex ante* measure of probabilities as they existed at the time Jill acted. It is an *ex ante* measure of the mildest act that it is *likely* that Jill, given her individual physical and psychological capacities, *could have succeeded in bringing about* to prevent the harm. Anything less would oblige self-defenders, under penalty of punishment, to either sacrifice

192. *Id.* at 444.
193. Steinhoff, *supra* note 4, at 145–50.
194. *See generally* Philip Montague, *Blameworthiness, Vice, and the Objectivity of Morals*, 85 PAC. PHIL. Q. 68 (2004) (focusing especially on Parts I and II).
195. Steinhoff, *supra* note 4, at 58.
196. *Id.* at 73.
197. Personal Conversation with Phillip Montague, Professor Emeritus, Department of Philosophy, Western Washington University (July and August 2014).
198. *See generally* Montague, *supra* note 194.
199. *See* HEIDI M. HURD, MORAL COMBAT 263–67 (1999).

> themselves to wrongful aggression or perform actions they have no likelihood of accomplishing.
>
> This does not mean that the metric is "epistemic" in being subjective to the actor at issue. The metric is an objective standard in being based upon society's considered judgment regarding the *ex ante* probabilities that existed at the time the actor acted, regardless of whether the actor himself was, or was not, aware of the probabilities at the time. Nor does the metric reduce to a "reasonability requirement" in being based upon facts known to the actor at the time he acted. It is based upon such facts regarding *ex ante* probabilities as society is aware of at the time of judgment, regardless of whether they were or were not known by the actor at the time he acted.[200]

First, I do not understand why an objectivist like Westen suddenly talks about *likelihoods*. This simply comes out of the blue. Moreover, just as we would be rather surprised if an alleged objectivist about physics claimed that it is a matter of community standards as opposed to mind-independent reality whether some cause X is necessary for some effect Y, we should also be rather surprised—and I am—when an objectivist about justification tells us that it is a matter of community standards as opposed to mind-independent reality whether some means X is the mildest means to avoid Y.

Second, what does it mean to talk of "the mildest act that it is *likely* that Jill, given her individual physical and psychological capacities, *could have succeeded in bringing about* to prevent the harm"?[201] As I made clear in the manuscript—including the relevant passage Westen quotes—the likelihood, also *ex ante*, that Jill *could* succeed in stopping the bullets in midair by holding her gun in a certain way and firing at a certain time is one.[202] It is not merely a probability, it is a determinacy. *If* she acts in a certain way, she *will* succeed. That is a fact of physics. However, one might ask, what is the likelihood that she *can* act in that way and thus satisfy the if-clause? Well, if the *can* refers to her physical and psychological capacity, the *likelihood*, again, is one: it is not *probable* that she is *able* to hold her gun in a certain way and fire it at a certain time, it is a *definite fact* that she *can* do so—she is not disabled, neither physically nor mentally.

So what, then, are the "*ex ante* probabilities"[203] in question that Westen, as objectivist, has in mind? That Jill *will* succeed in defending herself in this way, or that the community *thinks* she will succeed in defending herself in this way? But why should *that* matter? Consider a skilled heavyweight boxer who could easily defend himself against an attack by a little person by knocking that person out. Yet, he has an irrational fear of little persons. In fact, due to mistakes on their side, he has in the past been attacked ten

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200. Westen, *supra* note 161, at 444–45 (footnotes omitted).
201. *Id.* at 444.
202. Steinhoff, *supra* note 4, at 148.
203. Westen, *supra* note 161, at 445.

times by little persons—he had the fear before. On each occasion, he was overcome by fear, and instead of knocking them out, he shot them dead. Thus the ex-ante probability—epistemic, propensity, frequentist, and community-based—that he will defend himself against a little person by any other means than by killing him or her is—close to—zero. Does that make his lethal self-defense *necessary* in the relevant, namely justificatory, sense? I do not think so. Would *the community* think so? I doubt it.

Thus, Westen faces a dilemma. He can focus on what the person is *likely* to do. That, however, is irrelevant for justification, as the boxer case shows—or the case of a psychotic serial killer who kills everybody who looks at him the wrong way. Or he can focus on what the person *can* do. But, as already established, the person *can*, indeed, use the objectively mildest means. Again, that is just a physical and anatomical *fact*, and I thought objectivists were very much concerned about facts. Westen does not overcome this dilemma—nor does any other objectivist.

Thus, the objectivist still owes us an account of necessity that (1) can overcome this problem, (2) is not entirely *ad hoc*, and (3) fits objectivism. My non-objectivist account of necessity, relying on a reasonability metric, in contrast, does not even encounter the problem. I therefore think it is preferable.

Finally, let me note the interesting fact that an objectivist net harm theory cannot even explain why there should be a necessity criterion in the first place.[204] To wit, if a defender knows he can stop a culpable agent who would otherwise kill ten innocent people by either knocking him down or by shooting him, shooting him would still have avoided net harm—the lives of ten innocent people outweigh the life of one culpable aggressor—so *unnecessarily* shooting him would still have to be justified. So where does the necessity criterion of justified self-defense come from?

To be sure, Westen sometimes talks about objective justification being what society "regrets."[205] However, if this is supposed to be compatible with Robinson's net harm theory, so society only regrets net harms, then the regret theory obviously faces the same problem as the net harm theory. If, however, society can regret all kinds of things, then it can also regret unknowingly *justified* killings and thus attempted murders—and last time I checked society indeed seemed to regret that—and in that case the regret theory, *pace* Westen,

204. To be fair, virtually no self-defense theorist explains that.

205. Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—and Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 865–66, 875–78 (2003).

would speak in favor of the knowledge requirement and the view that attempts can be unjustified—or justified.

In contrast to Westen and Robinson's account, and to any other objectivist account, for that matter, the account I favor can explain both the existence of the necessity requirement and its lenient—and thus non-objectivist—contours in a straightforward, theoretically consistent, and plausible manner. Indeed, the knowledge requirement itself is the key. The argument, basically, is as follows. Morality must provide proper action guidance. A morality concerned with the rights of innocent people cannot, on pain of inconsistency, leave it to pure blind luck whether agents violate the rights of innocent people or not. Thus, proper action guidance must enjoin people to take *reasonable precautions* not to violate the rights of innocent people—see the example of the random shooter.[206] However, *taking reasonable precautions* involves a mental state, it requires people to act *reasonably*. Accordingly, they must have a *reasonable*, that is *justified*, belief that the other conditions of justified self-defense are fulfilled.[207]

Such a justified belief is only a necessary, not a sufficient condition for justified self-defense, because a rights-violation committed on the basis of a reasonable belief is still a rights violation. Therefore, my account is *mixed*: it requires justified *true* belief. That is the knowledge requirement. However, ought implies can. The *ought implies can* principle does not help the objectivist account, because Jill *can* do the things which would amount to the objectively mildest defensive means. But the principle does enable the *mixed* account to derive a less demanding necessity principle, for while she can *do* what amounts to using the objectively speaking mildest means, she cannot *know* what that means is. Even if she accidentally does it or even if she takes a wild guess and *rightly* believes that a certain measure is the objectively mildest one, that still does not amount to a *justified* belief, and thus it does not amount to knowledge. Thus, if ought implies can, and if there is a knowledge requirement of justified self-defense, the necessity requirement must be formulated in such a way that the defender *can know* what necessity requires. Hence, an account that demands a knowledge requirement can straightforwardly explain why the necessity requirement must not appeal to physical facts that are epistemically inaccessible to the defender. The objectivist account cannot explain that.

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206. *See supra* p. 505.

207. These conditions strike a balance between the interests, and in particular the protection of the rights, of innocent defenders, innocent aggressors, and culpable aggressors.

VIII. REPLY TO WALEN

Alec Walen thinks my view that rights may sometimes permissibly be infringed is mistaken; he believes the bystanders in the tactical bomber case are not permitted to defend themselves against the justified bombers—who would collaterally kill the bystanders—and that his "*Mechanics of Claims*" is a "better way to conceive of situations like this."[208] Let us see:

What is Walen's *Mechanics of Claims*? He states:

> On this model, first-order Hohfeldian rights are conclusions reached by balancing moral considerations that centrally involve competing claims of patients on an agent and the agent's own claims.
>
> . . . .
>
> We call the balancing of patient- and agent-claims the *Mechanics of Claims* because of its parallels to Newton's mechanics. In Newtonian mechanics, various forces can act on an object at a given time. The balance of external forces, the mass of the object itself, and any forces originating in the object together determine if and how the object will move. In our *Mechanics of Claims*, competing patient-claims pull an agent in different directions—towards or away from a given course of action or its alternatives. Her agent-claims are internal forces that can work to resist and sometimes overpower the combined force of the external claims on her. The balance of these competing forces determines how she is permitted or required to act.[209]

Most moral philosophers do not think trees have moral Hohfeldian claim-rights. But even if a 500-year-old oak tree has no claim-right against me that I do not cut it down, and even if all persons in the world have waived their presumed moral claim-rights against me that I do not cut it down, cutting it down for the mere fun of it nevertheless seems to be wrong. If that is correct, then what is permissible to do is not determined by Hohfeldian rights alone.

Interestingly, Walen actually admits that not "all wrongness is picked up by the Hohfeldian framework," but he thinks considerations like respect for nature or oneself "supplement the restrictions on agent[s]; they do not

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208. Alec Walen, *The Right to Cause Harm as an Alternative to Being Sacrificed for Others: An Exploration of Agent-Rights with a Special Focus on Intervening Agency*, 55 SAN DIEGO L. REV. 381, 408 (2018).

209. Alec Walen & David Wasserman, *Agents, Impartiality, and the Priority of Claims over Duties: Diagnosing Why Thomson Still Gets the Trolley Problem Wrong by Appeal to the "Mechanics of Claims*," 9 J. MORAL PHIL. 545, 551–52 (2012).

empower agents, which is what infringing would imply."[210] Yet, Walen provides no argument for this curious asymmetry. If non-Hohfeldian considerations can make it unjustifiable to act on one's Hohfeldian liberty, why, conversely, should they not also be able to make it justifiable to act against one's Hohfeldian duty? Intuitively, it seems to be a rights-infringement if I save the 500-year-old oak tree by using someone else's water-filled one-cent balloon to put out the incipient fire, but it nevertheless also seems justified. Thus, the possibility that rights can be permissibly infringed cannot simply be rejected by insisting on a certain model. What is important is the model's adequacy.

Given, moreover, that in Walen's model "Hohfeldian rights are conclusions reached by balancing moral considerations that centrally involve competing claims of patients on an agent and the agent's own claims,"[211] it is worth noting that within a Hohfeldian framework it is perfectly possible A has a duty towards B to do X and a duty towards C and D not to do X. But then, of course, neither recourse to Walen's claims nor to the resulting Hohfeldian rights and duties can actually dissolve this collision of rights and duties. However, recourse to permissible rights-infringement can.

Finally, Walen's *Mechanics of Claims* cannot even explain where the difference between liberty-rights, claim-rights, and powers comes from. Are there supposed to be different claims—liberty-claims, claim-right-claims, power-claims? Or is the difference supposed to be grounded in the different strengths of claims? If so, how? Walen does not say. Thus, the comparison to Newtonian mechanics does not really suggest itself as far as plausibility, clarity, and explanatory power are concerned.

Now, let us look at why Walen thinks that self-defense against "just combatants" is impermissible.[212] He subscribes to what he calls the "*agent-patient inference* . . . [which] moves from the agent's right to act to the agent's right, *qua patient*, not to be interfered with."[213] Obviously, Walen is talking of liberty-rights or Hohfeldian privileges. He concedes, however: "I do not think the agent–patient inference can be made *whenever* an agent has a right to act; sometimes other agents are permitted to try to interfere with an agent doing what she has a right to try to do."[214] Actually, however, the insistence on *trying* is not necessary here: sometimes persons are permitted to *actually*

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210. Comments from Alec Walen, Professor of Law, Rutgers Law School, to author (Oct. 2016) (on file with author).

211. Walen & Wasserman, *supra* note 209, at 551.

212. He uses this term repeatedly in his papers. *E.g.*, Walen, *supra* note 208, at 416. I use the quotation marks because the combatants in my example might be justified, but they nevertheless act unjustly because they infringe the rights of innocent people. In fact, I find this whole talk about "just combatants" in this context question-begging if not tendentious.

213. *Id.* at 383.

214. *Id.*

prevent someone from doing something permissible. I give the example of the evil aliens from outer space who credibly threaten to destroy Earth and wipe out humanity unless Bill tries—yes, indeed—his best to kill Jane and her five kids.[215] Under these circumstances, given what is at stake, it is hard to deny that it is permissible for Bill to try his best to kill Jane and her family. However, if trying his best involves *actually* killing two members of her family, then he is permitted to do so. In turn, it is obvious that Jill is permitted to resist Bill's attempt to kill her and her family. After all, if she succeeds, then not only will the rest of humanity be saved—as long as Bill tries his best—but in addition, other members of her family. In other words, Bill is permitted to try to kill Jill and even to *actually* kill her to avoid the death of humanity, and Jill is permitted to try to kill Bill and even to actually kill him to include her own family in that part of humanity that will be saved by Bill's action. Thus, they are both justified in intervening with the other's permissible action. Given this, one cannot rely on a general *agent-patient* inference to substantiate the claim that the civilians in the tactical bombers case may not defend themselves.

So, what *argument* does Walen actually have against my position? I must admit: I have difficulties finding one. While he accuses me of a "rather flat-footed understanding of rights as a given input into a situation—as though people simply *have* a right not to be killed and a right to engage in self-defense, unless that right is waived or forfeited,"[216] he evidently does not deem his own understanding of Walenian *claims* as a given input into a situation flat-footed. That is interesting. Moreover, it is actually incoherent to claim that I regard "rights as a given input into a situation"[217] while simultaneously admitting that on my account people can forfeit their rights. If they can forfeit them, they are hardly a given.

Walen then, referring to his "*Trolley Turners*" example,[218] states the following:

> If we assume the patient-claims of the five have been properly found to outweigh the sidetrack man's patient-claim on Brenda, then he has no right not to be killed by her. He does not have to forfeit any claims to lack a right not to be killed . . . .

215. Steinhoff, *supra* note 4, at 212. Walen thinks this example involves "the gap between intending and doing," not between "doing and interfering with doing." Comments from Alec Walen, *supra* note 210. He misunderstands the example.

216. Walen, *supra* note 208, at 407–08.

217. *Id.* at 407.

218. *Id.* at 396.

> As for the right of self-defense, Steinhoff simply assumes the sidetrack man's right of self-defense is unaffected by the context in which he acts. But how could that be? If he kills a justified actor like Brenda, then he kills someone for trying to do what she had both a right and morally sufficient reason to do. There is no reason to think such responsive action is justified in this context—for reasons already spelled out. The better view is that if the sidetrack man tries to defend himself against Brenda, he would thereby act wrongly and thereby forfeit his patient-claim not to be directly attacked in response.[219]

My example is the tactical bomber example, not the sanitized *Trolley Turners*.[220] So, allow me to leave Brenda on her tracks, where she belongs, and to turn to what is actually at issue here. Thus, first of all, to go up to the persons who have been burned and mutilated in the justified attack of the bombers and tell them their rights actually have not been infringed at all, and that, given the circumstances, they simply had no right not to be burnt or mutilated in the first place, is in my view staggeringly counter-intuitive and does not do justice either to the severity of the situation or to the moral status of the victims of the allegedly just combatants.

Second, Walen claims I simply assume things, but he himself simply assumes the "just combatants" had a *right* to do what they did, including a right to defend themselves against the civilians.[221] But how can *that* be, given that the civilians are entirely innocent and originally non-threatening while the combatants started the attack, threatening to kill and mutilate the innocent civilians? Is that irrelevant?

Third, Walen also simply assumes the weighting of the Walenian claims will lead to the outcome he prefers—but he most certainly does not *show* that.[222] In fact, even if we accepted Walen's claim that there is no such thing as a rights infringement and that the civilians have no claim-right not to be attacked, this does not yet show that they have no liberty-right to fight back. Walen himself, after all, cannot emphasize enough throughout his paper that people have a very strong claim against having to sacrifice themselves for others.[223] Thus, the sidetrack man in *Trolley Turners* is not obliged to sacrifice himself for the sake of others *although* the bystander is still permitted to turn the trolley towards him—the sidetrack man—to save the five.[224] To be sure, Walen at times seems to have a very narrow understanding of sacrifice—it sometimes seems that on his account you are being sacrificed if you are being used—but there is no reason to go along

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219. *Id.* at 408 (footnote omitted).
220. Steinhoff, *supra* note 4, at 160.
221. Walen, *supra* note 208, at 416.
222. *See generally id.*
223. *See id.* at 282–84.
224. *Id.* at 396.

with such a narrow understanding. What I say on McMahan also applies to Walen:

> [S]acrificing their lives *is* exactly what McMahan requires from the civilians. He does not require them to commit suicide, yes, but of course one can sacrifice one's life without committing suicide. If, for instance, someone asked me not to shoot the tiger that is attacking me because if I did, the tiger could not go on to then also kill the villain who otherwise would kill 20 innocent people, then, yes indeed, it seems that what I am being asked is to sacrifice my life for the benefit of these other people.[225]

No less pertinent is my reply to Victor Tadros.[226] Some small changes suffice, like replacing "interest" with "Walenian claim" and "means principle" with "distinction between killing someone for the sake of others and requiring him to sacrifice himself for the sake of others":

> Thus, when Tadros asks: 'What reason do we have to think that your interest in your own life is insufficiently powerful to ground a prohibition on my killing you, but sufficiently powerful to ground a permission on your preventing me from killing you?,' the answer suggested by the normative reasoning underlying his very own means principle is: 'By killing me you do not require me to adopt your goals, but by requiring me not to fight back you do.'[227]

To these arguments Walen replies as follows:

> The problem with Steinhoff's argument, however, is that he is insufficiently attentive to the nature of the claims on the sidetrack man. The five have claims on him that he not interfere with their being saved. If those were claims not to allow them to die, then Steinhoff would be right: the sidetrack man would be sacrificing himself for their sake. But that is not the option he faces. He faces six negative claims: Brenda's claim not to be killed and five claims not to have their saving interfered with. He does not face the demand that he sacrifice himself *for* her or *for* them.[228]

With due respect, this passage is biased, question-begging, and confused. Let me explain by referring to the tactical bomber. First, Walen's *bias* is obvious in that he posits that the bombers have a claim not to be killed and that the people the bombers want to save have a claim that their saving

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225. Steinhoff, *supra* note 4, at 198; Uwe Steinhoff, *The Liability of Justified Attackers*, 19 ETHICAL THEORY & MORAL PRAC. 1015, 1025 (2016) [hereinafter *Liability of Justified Attackers*].

226. *See* VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 205 (2011).

227. Steinhoff, *supra* note 4, at 207–08 (citation omitted) (quoting TADROS, *supra* note 226); Uwe Steinhoff, *Why We Shouldn't Reject Conflicts: A Critique of Tadros*, 20 RES PUBLICA 315, 321 (2014).

228. Walen, *supra* note 208, at 408–09 (footnote omitted).

not to be interfered with but does not even *mention* here the innocent bystanders' negative claims against the bomber that he not kill them nor their negative claims against the bomber's beneficiaries that they not save themselves by means that get the bystanders killed. Thus Walen's counting of merely "six negative claims" is poor math.[229] He also does not mention here that the bystanders have definitely done nothing to forfeit their right —or to weaken their "claim"—not to be killed or their right to self-defense.[230] In fact, the civilians literally do nothing that could possibly make them forfeit their right not to be killed or their right to self-defense—standing around does not qualify—while, on the other hand, threatening innocent and initially entirely non-threatening people with death and mutilation certainly counts as *doing* something. Indeed, it actually sounds like an immensely plausible candidate for doing something by which one can forfeit one's right—or very significantly weaken one's "claim"—not to be attacked in self-defense.

Now, Walen of course claims the bystanders do not have a right not to be killed because this right is not produced by the "balance of claims."[231] However, as I already pointed out above, he simply does not show that, nor does he show that the balance of claims produces a right of the *bombers* not to be killed. To repeat my question from above: "[h]ow can it be [that the bombers have a right not to be killed] given that the civilians are entirely innocent and originally non-threatening while the bombers started the attack, threatening to kill and mutilate the innocent civilians? Is that irrelevant?"[232] Walen's response to this question is, interestingly enough, that it *is* relevant.[233] But if it is relevant, then the claims which the bombers have against the civilians are plausibly weaker than the claims of the civilians against the bombers. The same is true for the claims of the bomber's beneficiaries. Why should they have a *right* that the bystanders not interfere with their being saved when they, the beneficiaries, unlike the bystanders, induce others—intentionally or not—namely the bombers, to kill or mutilate innocent people? The beneficiaries are in fact the *cause* for the bystanders getting attacked, while the bystanders only respond to this threat. In fact, should one's claim to life not be stronger if it can be met without necessitating the killing and mutilation of innocent people? It seems to me that one has to answer this question in the affirmative—unless one has, to use Walen's

229. *Id.* at 408.
230. *See generally id.* That is a major motif of my criticism of McMahan, and it is curious that Walen does not address this point. To be sure, Walen briefly mentions the point, *id*. at 407, but only to then ignore it.
231. *Id.* at 405.
232. *See supra* p. 514.
233. Comments from Alec Walen, *supra* note 210.

terminology, a rather flat-footed understanding of the nature and strength of claims. Moreover, the survival of the bystanders only requires that the bomber's would-be beneficiaries are *allowed to die*, while the survival of the bomber's would-be beneficiaries requires that others are killed and thus, indeed, sacrificed so that they can live. But then, in the balance of claims, the civilians should have a right not to be killed by the bombers while the bombers do not have a right not to be killed by the civilians.

In addition, elsewhere Walen argues that claims are the weaker the more "restricting" they are, and vice versa.[234] While Walen's particular notion of a "restricting claim" and the use he makes of it are misguided,[235] there seems nevertheless to be some intuitive pull to the idea that, all else being equal, a claim is the stronger the less restricting it is for the options of other people because then it imposes lesser costs on them. But then it should perhaps be noted—after all, Walen wants us to be "attentive to the nature of the claims" involved[236]—that a *claim-claim* is more restricting than a liberty-claim. To wit, the bystanders' claim to the liberty to defend themselves leaves the beneficiaries of the bombers the options to induce the bombers to kill the bystanders for their benefit and also to do this killing themselves, and it leaves the bombers the option to kill the bystanders and to defend themselves against the defense of the bystanders. In contrast, the beneficiaries' claim that the bystanders not interfere with the bomber's attempt to kill the bystanders for the sake of the beneficiaries does *not* leave the bystanders the option to defend themselves. It only leaves them the option to die—which seems not to be much of an option anyway. Thus, even if—or perhaps *because*—the *more* restricting *claim-claim* of the bystanders against the beneficiaries that the latter do not make others kill the former is outweighed by the less restricting liberty-claim of the beneficiaries to make the bombers kill the bystanders, this does not show—on the contrary—that the *less* restricting *liberty-claim* of the bystanders to defend themselves does not, likewise, outweigh the more restricting claim-claim of the beneficiaries against the bystanders that the latter *not* interfere with attempts to save the

234. Alec Walen, *Transcending the Means Principle*, 33 L. & PHIL. 427 (2014). *See generally* Alec Walen, *The Restricting Claims Principle Revisited: Grounding the Means Principle on the Agent–Patient Divide*, 35 L. & PHIL. 211 (2016).

235. For an argument to this effect, see Uwe Steinhoff, *Wild Goose Chase: Still No Rationales for the Doctrine of Double Effect and Related Principle*s, CRIM. L. & PHIL (Feb. 23, 2018), https://link.springer.com/content/pdf/10.1007%2Fs11572-018-9456-y.pdf [https://perma.cc/YN9M-XNJQ].

236. Walen, *supra* note 208, at 408.

former at the cost of the bystanders' lives. Walen does not only not provide an answer to this problem, he does not even notice it.

Thus, far from *showing* that the bomber has a right not to be killed, far from deriving that from a *balance of claims*, Walen actually just question-beggingly assumes it. In fact, however, the *balance of claims* seems to suggest exactly the opposite conclusion than the one Walen is intent on drawing.

The *confusion* in Walen's argument is apparent in the fact that he now suggests that the violation of a negative claim that others do not interfere with one's being saved excludes the possibility that such non-interference amounts to a sacrifice. This suggestion is mistaken.[237]

As already explained, by not defending themselves, the civilians would indeed sacrifice themselves for the sake of others. To repeat my point from above: "If, for instance, someone asked me not to shoot the tiger that is attacking me because if I did, the tiger could not go on to then also kill the villain who otherwise would kill 20 innocent people, then, yes indeed, it seems that what I am being asked is to sacrifice my life for the benefit of these other people."[238] And in fact, Walen *agrees*. He says this "*is* an instance of allowing yourself to be harmed for the sake of others," and that this is "like [his] Bomb case," a case in which a person is not prohibited from saving herself although by doing so she will cause the death of others.[239] But, of course, the tiger is exactly like the bombers in that neither the killed tiger nor the killed bombers can, being dead, then go on to save the innocent people from the villain(s). Thus, if the people to be saved have no claim against me that I allow myself to be eaten by the tiger, then, likewise, the people to be saved by the bombers have no claim against the civilian bystanders that the latter allow themselves to be killed or mutilated by the bombers. But then, there is simply no way that the *balance of claims* can give the bombers a right not to be killed by the civilians.

Thus, it seems that it is in fact Walen who is "insufficiently attentive to the nature of the claims" involved,[240] while, conversely, it does not seem that his *mechanics of claims* is, as he contends, "the better way to conceive of situations like" those described by the tactical bomber example.[241] On the contrary, if the "*Infringement Model*" is mistaken, as Walen claims, it is not even clear how his *Mechanics of Claims* can justify the bombing in the first place.[242] The civilians do nothing to forfeit their right to life, nor does the

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237. Equally mistaken is to suggest in this context a difference between the beneficiaries' claim that the bystanders "not interfere with their being saved" and their claim that they "not [] allow them to die." Walen, *supra* note 208, at 408.

238. *See supra* p. 515

239. Comments from Alec Walen, *supra* note 210.

240. Walen, *supra* note 208, at 408.

241. *Id.*

242. *See id.* at 389.

balance of claims speak against them having such a right to start with. Thus, if there cannot be justified rights infringements, the civilians should not be bombed at all. Even if Walen's mechanics of claims could establish that it is justified to bomb the civilians, his framework would nevertheless be quite compatible with the permissibility of the civilians' self-defense: the balance of claims would give the bombers at best a liberty to bomb the civilians, but not a claim-right, that is, not a right not to be interfered with. In fact, Walen's position would actually *imply* the permissibility of the civilians' self-defense against the bombers, as I have shown above in the context of my arguments against McMahan and Tadros[243]—arguments that are equally applicable to Walen and which he has failed to refute. After all, as Walen knows, "[a]gents . . . have a strong claim not to have to sacrifice themselves for others and an equally strong claim to be free to prevent themselves from being sacrificed for others."[244] Then, however, the civilians should be permitted to defend themselves against the bombers instead of being obliged to allow themselves to be killed or mutilated for the benefit of others.

IX. REPLY TO MOORE

Michael S. Moore says his "main suggestion" to me is that I allegedly need "to be less Hohfeldian in [my] conceptualization of rights, the right to self-defense included."[245] He thinks, in conclusion, that I have

> no need to identify the *right* to self-defense that we each possess as a mere "liberty-right"—a naked permission or a naked liberty. It can and should rather be seen as a protected permission to defend oneself, a permission—whose correlative duty of the non-prevention by others—rules out the possibility of moral combat.[246]

Well, first, I explicitly describe the normative structure of the self-defense justification as one consisting of a liberty-right to defend oneself, a claim-right against others not to interfere, and an agent-relative prerogative that allows one to discount certain negative consequences of one's act of self-defense.[247] It is true, however, that I argue that there are *special* situations

243. *See supra* p. 515.
244. *Id.* at 414.
245. Michael S. Moore, *Steinhoff and Self-Defense*, 55 SAN DIEGO L. REV. 315, 316 (2018).
246. *Id.* at 337–38 (footnote omitted).
247. Steinhoff, *supra* note 4, at 21–32. For an earlier version of that section, see generally Uwe Steinhoff, *Self-Defense as Claim Right, Liberty, and Act-Specific Agent-Relative Prerogative*, 35 L. & PHIL. 193 (2016).

where a person might have a mere liberty to defend oneself without a claim-right that others not interfere. But such situations are then not covered by the self-defense justification properly speaking, but by a justifying emergency or necessity justification.

So, I do not think I should be less Hohfeldian in my conceptualization of rights; rather, I think Moore should be less Hurdian in his conceptualization of permissions. To wit, if one conceptualizes a permission in such a way that it comes with a "correlative duty of non-prevention by others" and thinks, as Moore seems to do, that a duty not to do X is incompatible with a permission to do X[248]—he rejects infringement—then one cannot even coherently formulate a central concept of Moore's analysis, a concept, moreover, he wants to hit me over the head with. To wit, Moore claims: "Also seemingly possible is 'weak moral combat,' where at least one party has a moral right to prevent what another party has a moral right to do."[249] Not so: if one adopts Moore's definition of a "right" as a Hurdian "protected permission" then "weak moral combat" is not "seemingly possible"[250] but obviously conceptually *im*possible. In fact, Moore himself admits that: "For our analysis of active rights as protected permissions, when X has a right to do some action, A, it cannot be the case that there is weak moral combat—that is, that others such as Y can equally have the right to prevent X from doing A."[251] In any case, one cannot answer substantive moral questions by offering stipulative definitions.

Before coming to the actual heart of Moore's criticism—which, I think, has much less to do with conceptual issues than Moore makes it sound—let me make some minor observations. First, Moore quotes me as saying that if a woman "has a claim-right towards B to do *x*, this means that B is under a duty towards her, A, not to interfere with her doing *x*."[252] Commenting on this, he then states:

> this is not how Hohfeld would analyze a claim-right to self-defense; there are no such active claim-rights for Hohfeld. And while Hohfeld would allow that there be a claim-right to non-interference in the woman's doing of X, this would be contingent and occasional, not an analytically necessary and universal accompaniment to the women's privilege to do X.[253]

However, first, while it is indeed true that Hohfeld nowhere talks of claim-rights *to do* something, many modern scholars—including myself—do and

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248. Moore, *supra* note 245, at 338.
249. *Id.* at 318.
250. *Id.* at 338.
251. *Id.* at 321.
252. *Id*. at 8 (quoting Uwe Steinhoff, *Rights, Liability, and the Moral Equality of Combatants*, 16 J. ETHICS 339, 340 n.2 (2012) (emphasis omitted)).
253. Moore, *supra* note 245, at 322.

mean by that, as noted, a claim-right against others that those others do not interfere with one's action in question.[254] Second, if such active claim rights *are* rights against non-interference and Hohfeld actually does allow them, however contingently, than it is simply wrong that there are no such active claim-rights for Hohfeld.

Second, Moore claims that a certain analysis of the plank case "runs into trouble" because "neither mother is exercising a mere privilege when she places her child on the plank" but also an obligation.[255] It is not entirely clear where the trouble is supposed to come from. Maybe Moore thinks it would be incoherent to ascribe to the mother both a mere privilege and an obligation. Fortunately, however, I am not doing that. There is no such term as "mere privilege" in Hohfeld's terminology. There are privileges, though. And they are entirely compatible with obligations, so that a mother can have both the privilege and the obligation to place her child on the plank. That is exactly my entirely coherent position. Or Moore thinks that the problem lies in there being moral combat between the two mothers here. As we will see, there is not.

Third, Moore says: "I take it that the intended payoff of Steinhoff adding [an] 'agent-specific agent-relative prerogative' to liberty-rights and claim-rights for a complete analysis of what it means to have an active right, is to give him the results he desires about the cases considered in the text."[256] Is that supposed to be a criticism? I do not know. However, I guess Moore's intended payoff of adding "strong permissions" to mere weak permissions in the case of self-defense is to get the results *he* desires.[257] It seems, moreover, that we desire the same results: to outweigh the normal consequentialist balance of evils in favor of self-defense.

Let me now come to what I think are the actual three main criticisms that Moore offers against my account: (a) he thinks my analysis of the tactical bomber case is incoherent; (b) he thinks my analysis leads to "moral combat" and that this is undesirable and thus speaks against my account, and (c) that to the extent one tries to make sense of mutual liberties of people to fight each other, one should do so by stripping such situations

254. Thus, there is nothing particularly "idiosyncratic" about my terminology, *pace* Moore, *see id.* at 328, in contrast to his own terminology, which is only used by Hurd and himself.

255. *Id.* at 331.

256. Moore, *supra* note 245, at 330 n.70.

257. MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 39–40 (2010).

of their moral dimensions. In the following I shall argue that Moore is wrong on all three counts.

Ad (a) Moore says:

> I . . . have little sympathy for Steinhoff when he says that the bombers "are at best justified, but that does not make them innocent in the relevant sense (namely in the sense of not wronging others)." This is on its face a contradiction; if the bombers are justified . . . then they are at least permitted to bomb; if they are permitted to bomb, it cannot be the case that they are obligated not to bomb; unless they are obligated not to bomb, they do no wrong when they do bomb.[258]

I have little sympathy for Moore imagining contradictions where none are to be found. There simply is no contradiction. Rather, there is a distinction between *doing wrong*, that is, acting impermissibly all things considered, and *wronging someone*, that is, *violating or infringing* his rights. There is nothing "Pickwickian"[259] about this sense of *wronging*. As Douglas Husak notes: "It is now widely accepted that judgments that IV's [Innocent Victim's] act is permissible do not entail that WA [Wrongful Aggressor] is not wronged by IV's conduct."[260] Yes, it is, and it is also accepted by McMahan, whom I am discussing in the section Moore is referring to here. Thus, my claim is that the bombers are engaged in an all-things-considered justifiable rights violation. They have a lesser evil justification for this rights violation.[261]

Moore also claims that, "[b]y hypothesis, [the bombing] was the right thing to do—that is, it was both justified and just."[262] Absolutely not. By hypothesis the bombing was justified but *unjust*. As I state in the manuscript: "Moreover, [McMahan] explicitly defines *'justified threateners'* [like the tactical bombers] as 'people who act with moral justification but whose justified action will wrong or infringe the rights of others—in this case,

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258. Moore, *supra* note 245, at 327.

259. *Id.*

260. Douglas Husak, *The Vindication of Good over Evil: "Futile" Self-Defense*, 55 SAN DIEGO L. REV. 291, 293 n.1 (2018); *see also* F. M. KAMM, INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM 227–84, 466–68 (2007). As Kamm nicely puts it: "[O]ne could wrong someone in the course of doing a right act." *Id.* at 488 n.19.

261. In a footnote, Moore admits I am not "the only philosopher who uses these peculiar locutions." Moore, *supra* note 245, at 328 n.55. But he declares, "Yet it does nothing to advance the argument—that those like the villagers have both a right of self-defense and a right to compensation if they are bombed—to say that rights-infringements are '*somewhat wrong*' and that only rights-violations are '*really wrong*.'" *Id.* I do not think that it does anything to advance the argument to falsely give the impression that I use terms like *somewhat wrong* and *really wrong*. Given that I, like so many others, believe in infringement—for reasons that I make very clear in the manuscript—I simply distinguish between the violation of *Hohfeldian rights* on the one hand and doing something wrong *all things considered* on the other. I fail to see what is so difficult to understand about this distinction.

262. *Id.* at 327.

the villagers' right not to be killed.'"[263] McMahan deems rights-infringements as "*unjust*."[264] While Moore claims there is "no useful sense of *wrong* or *unjust* here that does anything but confuse the issues,"[265] one can easily avoid confusion by keeping *unjust* and *justified* as well as *doing wrong* and *wronging someone* apart, as do both McMahan and I.

Moore, however, compounds the confusion by saying:

> [Y]et the bombers, Steinhoff tells us, still have the right to defend themselves against the civilians' use of defensive force.
>
> . . . It looks like he comes out this way: the villagers' *right* to use defensive force . . . is only a naked, Hohfeldian liberty, not a protected permission—what Steinhoff idiosyncratically appears to call a "claim-right" to do something. Likewise, the bombers . . . only have a naked liberty as well.[266]

Actually, I do *not* tell anybody that the bombers have a *right* to defend themselves. Rather, they have a lesser evil justification to do so, the same justification that justified their mission in the first place. Nor do they have a Hohfeldian liberty—what Moore appears to call a "naked permission"[267] —to defend themselves. Rather, the villagers have a Hohfeldian claim-right to life and a Hohfeldian claim-right that the bombers not interfere with their defense against the bombing. The bombers have a lesser evil justification to *override* both claim-rights but that does *not* give them a Hohfeldian liberty to do so. This account is logically and conceptually coherent.

Ad (b) Moore claims: "Steinhoff touts self-defense rights as being such as to permit or require moral combat between persons."[268] Let us see: following Hurd, Moore defines moral combat as a situation were "one person's moral success necessarily comes at the cost of another person's moral failure," and thinks only a malevolent god can create such morality.[269] He elaborates:

> For example, each of two mothers, each of whom is obligated to save her own child, seeks both to place her child on a plank that can only support one and to prevent the other mother from doing the same. While both mothers can fail in their obligations—both children drown—at most only one can succeed in doing

263. Steinhoff, *supra* note 4, at 190 (quoting Jeff McMahan, *Self-Defense Against Justified Threateners*, *in* HOW WE FIGHT: ETHICS IN WAR 104, 107 (Helen Frowe & Gerald Lang eds., 2014)).
264. *Id.* at 187 (quoting McMahan, *supra* note 263, at 114–15).
265. Moore, *supra* note 245, at 327.
266. *Id.* at 328 (footnotes omitted).
267. *Id.* at 337.
268. *Id.* at 316.
269. *Id.* at 317.

> the two things she is obligated to do, which is to both save her child and prevent the other mother from saving hers. This second game is almost as enjoyable to the malevolent Greek god as the first, because *collective* success will elude the humans in this game as certainly as it eludes an individual in the case of conflicting obligations being owed by one and the same individual.[270]

No, it will not. Given that Moore is concerned about a morality being fair,[271] one would think a benevolent god would accept *ought implies can*.[272] It is unfair to burden people with moral demands they cannot comply with.[273] Thus, a benevolent god would say that a duty of care—of mothers towards their children, doctors towards their patients, life-guards towards the swimmers—is a duty to do their best under the circumstances, but not a duty to actually succeed in their attempt to *save* those in their care. After all, if one of the mothers is simply the better fighter, the other mother cannot save her child. Thus, siding with more benevolent gods here and accepting ought implies can, I simply have to reject Moore's unwarranted assumption that one of the fighting mothers will necessarily fail in her duties if the other succeeds. If both have done their best—in trying to save their child[274]—both succeed in fulfilling their duties. Moore's morality, however, seems to condemn the two mothers to letting both of their children die. Whose gods are more malevolent: mine or Moore's?

Moore tries to escape these objections. He states:

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270. *Id.* (footnote omitted). Incidentally, even if the two mothers had the obligation to save their own child and thus *to do something that will*, under the circumstances, prevent the other mother from saving hers, this is not the same as saying the mothers have *the obligation to prevent* the other mother from saving her child. To wit, I might have the obligation to do something that will collaterally harm others, but that does certainly not mean I have the obligation to harm them.

271. *Id.*

272. At least in the case of all-things-considered obligations—which we are talking about now—not in the case of *all* Hohfeldian duties. To wit, if I voluntarily acquire a Hohfeldian duty, for example by promise or contract, of which I know I might not be able to discharge it under certain foreseeable circumstances, then I cannot complain if those circumstances arise. Moreover, as we saw, the breach of a Hohfeldian duty is not necessarily wrong, that is immoral, although it leaves one *indebted* towards the person whose right one has infringed. Thus, morality would be unfair by imposing all-things-considered obligations that cannot be discharged, but not by imposing some *Hohfeldian* duties that under certain circumstances cannot be discharged.

273. Again, morality does *not* always demand that a given Hohfeldian duty be discharged. There can be justified rights-infringements or it can be impossible to discharge a certain Hohfeldian duty. That does not mean that such duties are irrelevant. Their infringement leaves a *moral remainder* and might have further moral consequences, for example, a duty to compensation.

274. Or in trying to prevent the other mother from saving hers, although I do not think there is such an obligation. *See supra* note 270.

> Even if all obligations had as their content "tryings" rather than doings—which they do not . . . one mother's obligation to *try* to prevent the other mother's success in her obligation to *try* to save her child would constitute strong moral combat, even though the definition of moral combat would shift a bit. It would be as gladiatorial and as unfair to obligate the person to try to undo what another is obligated to try to do. Gladiators who are obligated to try to kill one another, and to try to prevent themselves from being killed, will fight just like gladiators who are obligated both to kill one another and to prevent themselves from being killed.[275]

First of all, I do not claim that *all* obligations have as their content tryings rather than doings. I talk about duties of care above. Moreover, given that, in the article Moore refers to, Heidi Hurd herself adduces an example that is structurally similar to one half of my Kevin–Bob example to demonstrate exactly what I try to demonstrate—namely that sometimes trying to do X can be justified while succeeding in doing X would not be justified[276]—I wonder how one could then possibly claim that it cannot also be the case that sometimes trying to do X is obligatory while actually succeeding in doing X is not. Whence the mysterious difference? Hurd does not explain, nor does Moore.

Second, Moore defines "strong moral combat" as "situations where at least one party is obligated to prevent another party from doing what would satisfy that other party's obligation."[277] Unfortunately for him, "one mother's obligation to *try* to prevent the other mother's success in her obligation to *try* to save her child"[278] would *not* constitute strong moral combat because it is entirely possible for *both* mothers to simultaneously *try* to keep the other mother from trying. For example, they can *try* to knock the other mother out before she even has the idea to get to the floating plank but *fail* to *actually* knock her out. Moreover, here as there the principle *ought implies can* applies: if it is *impossible* for one of the mothers to try to keep the other mother from trying—as it would be when the first mother *knows* that the other mother has already *started* trying—then she does *not* have an obligation to try to keep the other mother from trying. Thus, either way, there is no moral combat.

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275. Moore, *supra* note 245, at 318 n.21.

276. Heidi M. Hurd, *What in the World is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 192–93 (1994). The other half of my example is of course the *comparison* between Kevin and Bob, which helps to undermine a position Hurd defends, namely objectivism.

277. Moore, *supra* note 245, at 318.

278. *Id.* at 318 n.21.

Third, even if it were "unfair to obligate the person to try to undo what another is obligated to try to do,"[279] it still would not be moral combat, as we just saw. Of course, Moore might want to "shift" the "definition of moral combat . . . a bit,"[280] but as I said above, stipulative definitions do not amount to a substantive moral argument. Moreover, while a morality that ignores the ought implies can principle—as Moore's morality seems to do—is indeed unfair, a morality that demands of all people the same and does not demand more than they can do is *not* unfair. There is nothing unfair in two boxers being obliged to try to knock the other out. Nor is there anything unfair in two mothers being obligated to try to save their own child, even if doing so would mean that the other child dies.

As regards Moore's morality apparently condemning *both* children to die—which is also not unfair, but it would certainly be irrational—Moore first suggests the "almost dead" exception as an escape route.[281] He then seems to admit that this exception does not apply "in this version of the plank case,"[282] but then nevertheless claims that it "does apply."[283] I find this back and forth suspicious and rather unconvincing. In any case, his supposed solution is this:

> When both children are about to drown (t_3), each mother's obligations— to save and to thwart—cease and they are nakedly at liberty at t_3 to throw off the other child, throw off their own child, and to prevent the other from throwing off either child. To be sure, such a moral state of nature may yet result in both infants' deaths—if the two mothers cannot work out some accommodation—but at least morality does not require that no such accommodation be reached—and that both infants must therefore die.
>
> Notice that at t_3 there is no moral combat—at least no more than at t_1 and t_2—and Hurd's alternative logic of rights—ruling it out—is secure in such cases.[284]

In other words, while it originally seemed that Moore's morality obliges the mothers to let both their children drown, now the mothers' obligations to save their children—*poof!*—just evaporate. They can kill the other child, they can kill their own child—who cares? Certainly not Moore's god. Thus, theologically speaking, Moore faces the problem that his god is either cruelly condemning both children to die or he is cowardly fleeing the scene. But, at least "Hurd's alternative logic" is "secure."[285] Need I say that I find the god suggested by my account vastly superior to the god suggested by Moore's?

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279. *Id.*
280. *Id.*
281. *Id.* at 332.
282. *Id.*
283. *Id.* at 333.
284. *Id.*
285. *Id.*

Moving on, recall Moore's definition of weak moral combat, "where at least one party has a moral right to prevent what another party has a moral right to do."[286] It should be obvious that on this definition weak moral combat relates to moral combat as defined above as square-headed, round-headed paper tigers relate to tigers. Given that, as I already explained above, weak moral combat as defined here by Moore is logically impossible—due to Moore's Hurdian definition of a right as a "protected permission"[287]—it can hardly be a kind of moral combat, for moral combat as defined above *is* logically possible. In any case, it is certainly not worthwhile to conduct philosophical debates in terms of incoherent concepts.

Luckily, elsewhere Moore, together with Hurd, provides an implicit definition of weak moral combat that has at least the advantage of not being incoherent. They provide this as an example: "[T]wo men on a plank that can only support one are permitted to throw the other off to his death in Hohfeld's sense of 'privilege,' viz, one does not wrong in doing so . . . . Since each has such a permission, each is morally permitted to engage in active combat."[288] But still, now it should be obvious that on this definition weak moral combat relates to moral combat as defined above as paper tigers relate to tigers. A paper tiger is no tiger at all. If both parties are *permitted* to do what they are doing, then they can hardly *fail in their moral obligations.*[289] Moreover, as we just saw in the plank case with children, Moore has absolutely no problem with all parties being privileged, that is having *naked liberties*, to kill each other. So even if my account implied the existence of *weak moral combat*—what is the complaint? After all, as we saw in the last indented quote, Moore himself proposes weak moral combat in this sense as a solution to his own problems. If he is happy to embrace it, why should I not be?

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286. *Id.* at 318.

287. *Id.* at 320.

288. Heidi M. Hurd & Michael S. Moore, *Moral Combat and the Hohfeldian Analysis of Active Rights*, *in* THE LEGACY OF WESLEY HOHFELD: EDITED MAJOR WORKS, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES (Shyam Balganesh, Ted Sichelman & Henry Smith eds., forthcoming 2018). My objections to Hurd's and Moore's position are by and large also applicable to their line of reasoning in this text.

289. Of course, on my account—but evidently not on Moore's—one can be permitted in infringing one's Hohfeldian duty towards another person on grounds of a lesser evil justification, but such an infringement would not be immoral, and it is immorality that is at issue when Moore talks about *moral failure*.

Thus, to summarize: First, if one accepts *ought implies can*, Hurd's "moral combat"[290] seems to become a non-issue—it simply cannot exist. Second, it is conceptually impossible that *weak* moral combat is moral combat. Even more, depending on which definition we go with, weak moral combat is either an incoherent concept and thus worthless or it refers to something that even on Moore's own account is unproblematic. Thus, Moore's argument that my account implies a problematic form of moral combat, and is therefore to be rejected, collapses. There is no such moral combat in my account.

Ad (c) Even if the two mothers fighting for the plank—or the tactical bombers and the civilians fighting against each other—are not situations of moral combat, that is, situations that tragically condemn one of the parties to fail in their moral obligations, the mutual justification of both parties to fight each other could perhaps still be ruled out on independent moral grounds. However, neither Hurd nor Moore provide such independent moral grounds. In fact, two boxers simply *are* morally permitted to fight each other. Moreover, Moore confesses: "If I can locate and defuse a nuclear device at 42nd street only by torturing the innocent child of the terrorist who planted it there, I torture."[291] Yet, if two mothers could save their children and millions of New Yorkers from this nuclear device by either torturing a child or by fighting each other, then they certainly should do the latter instead of torturing the innocent child. Thus, there clearly are possible cases—even outside of sports events and situations of mutual consent—where one person is justified in fighting another while the other is also justified in fighting back, and these situations are cases of genuine moral justification.

Consequently, the attempt to relegate such situations to the realm of the *amoral* fail. Hurd, for example, admits that Hohfeldian privileges or liberty-rights make it possible that one person has the liberty to do X while another person has the liberty to prevent him from doing X, and then simply dismisses this real moral possibility by claiming that "Hohfeldian liberties define amoral actions."[292] Moore follows her in this assessment, compares the absence of a moral duty not to kill another person with the absence of a duty not to rub one's eyes, and declares that "[a]n absence of a duty and an absence of its correlative claim-right do not make for a kind of moral thing, no more than putting positive sounding labels on absent elephants . . . would transform such absences into kinds of elephants."[293]

First, Moore is comparing apples and oranges here. Liberty rights are indeed not moral things in the way elephants are physical things, which,

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290. Moore, *supra* note 245, at 318.

291. Michael S. Moore, *Patrolling the Borders of Consequentialist Justifications: The Scope of Agent-Relative Restrictions*, 27 L. & PHIL. 35, 44 (2008).

292. HURD, *supra* note 199, at 281.

293. Moore, *supra* note 245, at 336.

however, is simply due to the fact that liberty rights are *relations*. So, let us use the right analogy here: just as the absence of the as-big-as-relation between two existing elephants means the presence of a smaller-than-relation between them, so the absence of a duty-relation between two existing persons means the presence of a liberty-relation between them. Such a relation, like all relations, is not nothing, but something. Accordingly, the presence of a liberty-relation is morally as relevant as the presence of a smaller-than-relation is physically; and it is particularly bizarre to claim that a liberty to kill another person is morally as insignificant as the absence of a duty to rub one's eyes. In fact, Hurd herself states that acts of self-defense—and I would assume of killing—"appear to be of moral significance."[294] Yes, they do. And I claim the two persons in Nozick's falling man example have both a liberty and a permission—in my sense—to kill each other, where the permission is partly explained precisely by the liberty. "A plausible moral theory," says Hurd, "at least speaks to the question of self-defense."[295] Mine does.

I conclude that Moore's critique of my position is unsuccessful: my position is neither inconsistent, nor does it imply moral combat, nor is it *amoral*. Moreover, it is attuned to moral intuitions whose "tug" Moore admits feeling himself but then unfortunately feels obliged to deny on the basis of his unwarranted belief that moral combat cannot be escaped otherwise.[296] As I showed, it can. If ought implies can, moral combat seems not even to be an issue. At the very least, it is not a problem for my account.

X. REPLY TO BAZARGAN-FORWARD

To fully understand the debate between Saba Bazargan-Forward and me, the reader will probably need to know both Bazargan-Forward**'**s article and my criticism of his views.[297] For reasons of space and to avoid duplication, I will proceed assuming the reader is acquainted with both.

In response to my critique, Bazargan-Forward claims "it is not a consequence of [his] view that violating a right *to ten dollars* can diminish the wrongdoer's

294. HURD, *supra* note 199, at 281.
295. *Id.*
296. Moore, *supra* note 245, at 335.
297. *See generally* Saba Bazargan, *Killing Minimally Responsible Threats*, 125 ETHICS 114 (2014) [hereinafter *Killing Minimally Responsible Threats*]. For my critique, see Uwe Steinhoff, *Against a "Combined Liability-Lesser-Evil Justification,"* PHILOSOPHIA (June 24, 2018), https://link.springer.com/content/pdf/10.1007%2Fs11406-018-9992-7.pdf [https://perma.cc/ZP8P-8ZZW].

right not to be killed."[298] Yes, it is. Under the heading of "*The Complex Account of Liability*" he writes:

> If *P* is at least minimally responsible for an objectively unjust harm which she will impose on *Q* unless we preemptively harm *P*, then *P* is liable for no more than *n* percent of the unjust harm for which she is responsible, where *n* is equal to the percent moral responsibility she bears for that unjust harm.[299]

However, first, to violate, as a responsible agent, someone's right to $10 *is* to be morally responsible for an objectively unjust harm, just like killing someone unjustly but as a responsible agent *is* to be responsible for an objectively unjust harm. Accordingly, the unjustly harming agent will become liable to harm herself, and this is all that is needed to trigger Bazargan-Forward's "*Lesser Evil Discounting View*."[300] Moreover, Bazargan-Forward explicitly says: "I am assuming that harms can be measured on a single dimension yielding an interval measure of their moral significance."[301] Such a formulation hardly suggests any appeal to *thresholds*,[302] so I think I got the consequences of his account exactly right.

Bazargan-Forward also states in further support of his claim that I got the consequences of his account wrong:

> After all, a right to property and a right not to be killed can indeed be construed as entirely different rights. But it's much more difficult to say the same of 'the rights not to be killed' and 'the right we have not [to] be maimed.' They're quite similar. (Indeed, they might be grounded in the same right to continued physical integrity).[303]

Actually, they cannot only be *construed* as entirely different, they *are* different, which is shown in the fact that you can violate someone's right not to be maimed—for example, by cutting off his arm—*without* thereby also violating his right not to be killed. That would, for obvious logical reasons, hardly be possible if they were the same right. Indeed, the right not to be killed, the right not to be maimed, *and* the right not to be stolen from "might be grounded" in the same right *not to be harmed*.[304] Thus, by that logic, the

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298. Saba Bazargan-Forward, Commentary on Uwe Steinhoff's "Just War Theory: Self-Defense, Necessity, and the Ethics of Armed Conflicts" 1 (2016) (unpublished manuscript) (on file with the author).

299. *Id.*

300. *Id.*

301. *Minimally Responsible Threats*, *supra* note 297, at 122.

302. The idea to appeal to thresholds was flaunted during discussion. Yet, as we will see, that idea does not help either: if the threshold is, for example, losing a right to one's finger, or even one's arm, the fact still remains that a right to one's arm is not the same as the right to one's life, and therefore it is unclear why losing the former should diminish the stringency of the latter.

303. Bazargan-Forward, *supra* note 298.

304. *Id.*

right not to be stolen from is also "quite similar" to the right not to be killed.[305] In fact, in the paper under discussion, Bazargan-Forward mentions the "right not to be harmed" three times.[306] It thus seems to be of some importance.

Bazargan-Forward asks—apparently rhetorically—whether I "think that the right against the loss of an arm is a 'different right' than a right against the loss of a leg?"[307] Yes, I most definitely think that—who does not? If I tell the doctor regarding the threatening gangrene: "Look, I hereby allow you to amputate my arm, but hands off of my leg, I'm warning you," and the doctor, perhaps after having read Bazargan-Forward, decides, "Oh, what the heck, the right to an arm is *similar* to the right to a leg, so I can just as well amputate the leg instead of the arm," then I can kill the doctor in self-defense, if necessary. This strongly suggests to me that the right to an arm and the right to a leg are different rights—you do not waive one by waiving the other, nor do you forfeit one by forfeiting the other.

Bazargan-Forward, however, indeed contends:

> It's crazy-sauce for a wrongdoer to claim "Yes, I've forfeited my right against the loss of my arm, but as it turns out, the only way to stop me is to deprive me of my *leg*—and that's a completely different right, which means you can't discount the loss of my leg in your proportionality calculation!" I think it's similarly crazy-sauce for the wrongdoer to make an analogous claim about the right against the loss of his leg and the right against the loss of his life. If you lose the former right, and the only way to stop you is by depriving you of the latter, we are entitled to discount the disvalue of the latter loss (which doesn't necessarily permit inflicting that loss).[308]

No, we are not. In my amputation example, I *did* lose my right against my arm being amputated—I lost it by waiving it. And it is just *crazy-sauce*, to use Bazargan-Forward's expression, to claim that—due to the loss of the right to my arm—my right to my leg has become less stringent, so that the doctor can now more easily amputate it on grounds of a lesser evil justification—perhaps to cook one of Peter Unger's soups to save the poor.

Bazargan-Forward's talk about *wrongdoers* is therefore potentially misleading. When we hear that expression, we automatically think of *culpable* wrongdoers. In my manuscript, I have explicitly stressed that their interests can be discounted and that their rights might become less stringent; but, I have also made clear that this has to do precisely with their *culpability*,

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305. *Id.* What is good for the goose is good for the gander.
306. *Minimally Responsible Threats*, *supra* note 297, at 119, 126.
307. Bazargan-Forward, *supra* note 298, at 2.
308. *Id.*

not with their liability.[309] Now, of course, by using the term wrongdoers, Bazargan-Forward might also mean people who are merely responsible for wrongful action, without being culpable for it. But again, even if their rights lose something in stringency and their interests can be discounted—this does *not* establish that this has anything to do with liability. Their right to their *leg* is not less stringent because they are *liable to lose an arm*, but —if at all—because they are *morally responsible for a threat of unjust harm.* And in fact, Bazargan-Forward himself *concedes* that now.[310] But then his "*Response to [the] First Criticism*"[311] collapses, and it remains true that one's right to one's leg does not become less stringent only because one has lost one's right to one's arm. *Liability* as such has nothing to do with the *discount.*

Although Bazargan finally actually admits this, he at first nevertheless attempts to undermine my point that liability has nothing to do with the discount. He says: "Suppose the MRT [minimally responsible threatener] is liable to a broken arm. But we can only inflict two broken arms on him. We can discount the harm of inflicting two broken arms, because the MRT *is already liable to half of that.* It's as simple as this."[312]

No, it is not. Bazargan-Forward is at times confused by his own use of the word *discount*. This is one such occasion, and Bazargan-Forward runs things together that need to be kept apart. To wit, I always carefully distinguish between *subtraction* on the one hand and *discount* on the other. On Bazargan-Forward's account, the harm to which an MRT is liable can be *subtracted*—my word, he talks of that harm being "for free"—from the amount of harm necessary to stop the MRT and the harm *remaining after the subtraction* is the one that can—according to Bazargan-Forward—be *discounted* in the lesser evil justification.[313] Thus, if the *discount* is the discount referred to in Bazargan-Forward's formulation of the "*The Lesser-Evil Discounting View*," then it is misleading to talk about discounting "the harm of inflicting two broken arms."[314] Rather, the harm of *one* broken arm is to be *subtracted* from the harm that still needs to be justified by the lesser evil justification—the harm to the second arm—and it is *that* harm that is to be discounted.[315] And the question as to *why* that harm can be discounted leads us right back to my first criticism, which, as we saw, remains unrefuted.

Let me now come to Bazargan-Forward's admission, which I already mentioned. To wit, I pointed out: "[R]emarkably, his *own* explanation as

309. Steinhoff, *supra* note 4, at 218–19.
310. Bazargan-Forward, *supra* note 298.
311. *Id.*
312. *Id.* at 2.
313. *Id.* at 2–3.
314. *Id.* at 1–2; *see also Minimally Responsible Threats*, *supra* note 297, at 127.
315. Steinhoff, *supra* note 4, at 221–22.

to why harm inflicted on the MRT can be discounted, thus opening the way for a lesser evil justification, entirely *omits* any reference to liability but instead exclusively focuses on *responsibility*."[316] Bazargan-Forward replies:

> It's true that I neglect to mention liability in my characterization of the 'hybrid justification.' But what's crucial in the hybrid justification is the bearing of *some moral responsibility for an unjust threat*. Whether we call that 'liability' (which is determined in part by whether we think necessity is internal to it) doesn't matter for the sake of my main thesis. What's being 'hybrid-ized' (or 'combined') with the lesser evil justification is the kind of justification derived from one's moral responsibility for an unjust threat.[317]

Well, it does not matter what we *call* it, but it certainly matters what it *is*. Moral responsibility is not liability. That does matter for Bazargan-Forward's original thesis that we need a combined liability/lesser evil account; a thesis he seems rightly to be willing to give up now in light of my criticism. Moreover, there simply is no *combination*. That evils and goods, rights and interests, have to be *weighed*—which might, of course, involve discounting—is simply part and parcel of the lesser evil justification. Accordingly, Bazargan-Forward's proposal would at best be one more interpretation or version of the lesser evil justification, not some kind of exciting new combined justification.

Bazargan-Forward also says:

> So it might be correct that I should have focused on responsibility rather than liability—but that doesn't undermine the basic claim I'm making: if you're minimally responsible for an unjust killing, the fact that you are merely *minimally* responsible suggests that we can impose only a little bit of defensive harm on you; if it turns out that the only way to stop that unjust killing is by imposing more than that little bit, we can accordingly discount that great harm (in the way specified by what I call the 'complex account').[318]

This certainly was not the basic claim Bazargan-Forward made in the original paper. His claim there was more ambitious. Moreover, what *does* undermine Bazargan-Forward's new *basic claim* is my discussion of McMahan's "combined justification."[319] Bazargan-Forward has not responded to my examples although they clearly affect his position as much as McMahan's.

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316. *Id.* at 223.
317. Bazargan-Forward, *supra* note 298, at 3.
318. *Id.*
319. Steinhoff, *supra* note 4, at 217, and especially the examples provided at 214–19.

I also argue that Bazargan-Forward's account renders the wrong results. I try to show this with a rather—necessarily—complicated version of the mistaken resident case.[320] Bazargan answers that I am only reporting my intuitions here, and that I try to argue that "moral luck" is irrelevant.[321] Actually, I nowhere deny that *moral luck* is relevant. Rather, I argue that the *specific* difference that Bazargan-Forward's account makes capable of morally deciding between life and death is in fact morally entirely irrelevant.[322] If Bazargan-Forward does not share my intuitions in this case, so be it. Those, however, who do share my intuitions are well advised to reject his account.

Yet, Bazargan-Forward states:

> [S]uppose that moral luck is indeed morally irrelevant and that the lesser evil discounting view is not victim-relative in the way I suggested above. In that case, we can repair to the relevance of responsibility rather than liability—since both D1 and D2 are minimally responsible threateners, either of them can be permissib[ly] killed in accordance with the hybrid justification for killing MRTs.[323]

Of course, repairing "to the relevance of responsibility rather than liability" precisely *concedes* my point that liability has nothing to do with it, which the example was supposed to show.[324] Conceding my point is hardly a way of refuting it. Moreover, the examples I adduce against McMahan's "combined justification"[325] show that responsibility will not do the job either.

A further example I use is yet another variation of the mistaken resident case. In this variation, the mistaken resident is a surgeon about to operate the next morning on an innocent patient who will die if the killer's innocent twin shoots the surgeon in self-defense. I point out that on Bazargan-Forward's account the innocent twin must not shoot the surgeon, and that this is entirely implausible and counter-intuitive—both morally and legally.[326] Bazargan-Forward bites the bullet and states:

> I consider it a strength of the account that it does not permit defensive violence in this case. Agents cannot ignore the consequences of their actions—*including* the consequences of otherwise permissible self-defense. To claim otherwise is to suggest a kind of moral solipsism. And that's both implausible *and* counter-intuitive.[327]

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320. Bazargan-Forward describes the example, so I will not repeat it here. *Minimally Responsible Threats*, *supra* note 297, at 114–15. *See also* Steinhoff, *supra* note 297, at 14.
321. Bazargan-Forward, *supra* note 298, at 4.
322. And yes, I do think my example shows that.
323. *Id.* at 4.
324. *Id.*
325. Steinhoff, *supra* note 4, at 217.
326. *Id.* at 224–25.
327. Bazargan-Forward, *supra* note 298, at 5.

Actually, I do not say that agents can ignore the consequences of their actions. I do want to say, however, that they must not be enslaved by consequentialism. Individuals have rights and prerogatives, to claim otherwise is to abandon liberalism for a kind of moral socialism, where one becomes the mere serf of other people's interests. To wit, if one must not shoot the surgeon if this would cost the life of still one other person and because one *cannot ignore the consequences*, then it is difficult to see why this should be different with a fully culpable surgeon who tries to kill or rape you. Does Bazargan-Forward want to suggest that a woman must not kill a surgeon who is about to rape her if then the surgeon would fail to save two other people tomorrow? Must she sacrifice herself? I would not think so, nor does any Western jurisdiction.[328] I will not be able to talk Bazargan-Forward out of his intuitions, of course, but I console myself thinking that few would be inclined to follow him.

Finally, I point out that "contrary to what Bazargan claims, it is not intuitive at all that the MRT (or her estate) in *Mistaken Resident* is owed any compensation."[329] Bazargan-Forward replies: "I for one think that because the mistaken resident is acting non-culpably, she is not liable to be killed. Since she is not liable to be killed, killing her wrongs her. Since she is wronged, she is owed compensation. Q.E.D."[330]

Quod erat demonstrandum? While I appealed to our intuitions—which might not include Bazargan-Forward's intuitions, but which are certainly intuitions expressed by many if not all Western jurisdictions—and from there concluded that the resident *is* liable, Bazargan-Forward *stipulates* that the resident is not liable and then conveniently infers he must be owed compensation. That is not a *demonstration* but a mere claim. Moreover, Bazargan-Forward thinks the resident is at least liable to *some* harm[331]—so he is only haggling over the price. And indeed, why should an MRT not be liable to be killed? If an MRT threatening one innocent person is liable to some harm, why should an MRT threatening a genocide not be liable to be killed? Where is the threshold? Again, we are haggling over price. Moreover, given that above Bazargan-Forward endorsed moral luck—and particularly moral bad luck—why should bad luck not be sufficient to make the resident liable to be killed?[332] Be that as it may, again I will not be able to talk

328. The self-defense justification works in Western jurisdictions as a prerogative—in my terminology.
329. Steinhoff, *supra* note 4, at 226 (footnote omitted).
330. Bazargan-Forward, *supra* note 298, at 5.
331. *Minimally Responsible Threats*, *supra* note 297, at 115.
332. By the way, I am *not* a luck egalitarian!

Bazargan-Forward out of his intuitions, but again I think few will share them.

XI. QUESTIONS TO HUSAK

I do not really have a *reply* to Douglas Husak's paper, not least because it seems his account is compatible with mine. So, I content myself here with merely raising two questions. He says:

> My own rough approximation is that the futile force exerted against WA [wrongful attacker] by IV [innocent victim] implements, realizes, or instantiates the principle that *good should not capitulate*—or *yield—to evil.* 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.[333]

He considers the value produced by such futile self-defense to be "*impersonal* value."[334]

First, if the principle is that good *should* not capitulate to evil, this seems to imply a *duty* of self-defense—and also of other-defense, for that matter. In fact, the appeal to impersonal value might already imply this—depending on the moral background theory, which would have to be spelled out more clearly. Does Husak agree, and if so, is he fine with these implications?

Second, what if by engaging in futile self-defense against Bill, Clarice somehow, as a foreseen side-effect, facilitates Joe's wrongful attack on Carlos—Joe is invigorated by seeing Clarice struggle against Bill? It would appear that, if the attack on Carlos is the greater wrong, Clarice would have to desist from futile self-defense against Bill on Husak's account—but not on mine; or at least Husak's account would not justify it, which would speak against his account.

Obviously, I raised these questions during the conference, but I am still not entirely clear on the answer. I understood Husak as saying more work needs to be done here. Fair enough.

XII. A NOTE ON SIMONS

There also does not appear to be too much disagreement between me and Simons, so I do not have a *reply* here, either. Rather, I thank Simons for the hint that I should say more on the distinction between private and public necessity. This distinction is to be found in American law, but there is no

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333. Husak, *supra* note 260, at 305 (footnote omitted).
334. *Id.* at 309 (emphasis added).

equivalent in German law.[335] I will indeed fill this gap in the revised version of the manuscript. However, luckily for me, this distinction does not affect my argument. In fact, Simons states: "I find persuasive Steinhoff's argument that the potential collateral victims of the tactical bomber are owed compensation but at the same time are entitled to use defensive force to protect themselves from harm."[336]

Simons also notes there is a dearth of case law—and thus a lack of clarity—on the question of whether someone whose personal rights—as opposed to property rights—are being justifiably infringed is owed compensation.[337] I think, however, that given the law's stance on compensation for the infringement of property rights, it would be downright inconsistent to deny such a right to compensation in the case of liberty rights. As Simons notes himself: "On first impression, it seems indefensible that a person's interest in obtaining compensation for a potentially serious personal injury would receive less legal protection than a person's interest in compensation for infringement of a mere property interest."[338] But he adds:

> However, I believe an American court faced with such a case would be justifiably cautious before awarding full compensatory damages, in light of the potential magnitude of such an award, and the risk that the prospect of having to pay such an award would deter private actors from doing what they otherwise reasonably believed necessary to save themselves from harm—as in the escape-from-an-assailant case. . . . But imagine a future world in which providing full compensation for a serious personal injury were much less burdensome. Imagine that the restorative power of medicine improved to such a degree that no one ever died from traumatic injuries, and all such injuries could be promptly cured at modest cost. In such a world, I believe it would be incumbent on justified injurers to ensure that their victims obtained such a cure, and I believe courts would so insist.[339]

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335. There is something that is indeed called *öffentlicher Notstand*, but it is *not* an equivalent to the English concept of public necessity. *Compare öffentlicher Notstand*, RECHTSLEXIKON.NET, https://translate.google.com/translate?hl=en&sl=de&u=http://www.rechtslexikon.net/d/%25C3%25B6ffentlicher-notstand/%25C3%25B6ffentlicher-notstand.htm&prev=search [https://perma.cc/7949-Z88T] (describing Germany's "public emergency" law), *with Public Necessity*, L. DICTIONARY, https://thelawdictionary.org/public-necessity/ [https://perma.cc/8QC2-3Z6G].

336. Kenneth W. Simons, *Self-Defense, Necessity, and the Duty to Compensate, in Law and Morality*, 55 SAN DIEGO L. REV. 357, 369–70 (2018). In doing so, he seems to assimilate the case to a case of private necessity, which I think is correct in the specific tactical bomber case we are discussing. There might be other cases, but I need not discuss these here—not least because I have yet to form an opinion on the more anomalous cases I have in mind.

337. *Id.* at 362.

338. *Id.* at 372–73.

339. *Id.* at 373.

Note that this idea of an insurance scheme is exactly the same as McMahan's idea of a "burden-sharing scheme."[340] I discuss this under the suggestive heading, *Who "Should" Compensate?—and Why That Does Not Matter*."[341] To wit, it does not matter for the question whether the rights infringer has a Hohfeldian duty to compensate toward the victim of the infringement. I state:

> [W]hat if the passerby does not have enough money, what if he is really poor, and taking his money for the insulin would impose an unreasonable hardship on him? In that case, I submit, perhaps neither the state nor the owner *should* insist that the passerby compensate the owner. But, again, this does not mean that he has no *duty* to compensate, that he is not *liable* to pay compensation. Out of beneficence or compassion the owner should *not insist on his right* . . . but, conversely, the passerby should at least apologize to the owner: "Look, I am really sorry, but I can't pay for the damages I unjustly inflicted on you." This confirms that he is not released of his duty towards the owner (unless the owner releases him himself), even if, all things considered, one should not make him pay out of compassion and mercy.[342]

Thus, that a "court faced with such a case would be justifiably cautious before awarding full compensatory damages"[343] does not mean that the rights infringer does not owe the victim a moral Hohfeldian duty of compensation, a moral duty that the law should somehow acknowledge, even if, all things considered, the legally enforceable compensation should be capped at some point or, in cases of extreme hardship, not be enforced at all. Simons's belief that "it would be incumbent on justified injurers to ensure that their victims obtained . . . a cure" if the cure's costs were not exorbitant is—as far as I can see—completely in line with this position.[344] It does certainly not contradict it.

340. McMahan, *supra* note 263, at 119–20.
341. Steinhoff, *supra* note 4, at 200–02.
342. *Id.* at 201–02. *See generally Liability of Justified Attackers*, *supra* note 225.
343. Simons, *supra* note 336, at 373.
344. *Id.* at 373.