

The Constitution and the Right of Self-Defence

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DRAFT: August 2009

Work in progress: Do not cite or quote without permission.

For comments on a draft of this paper, I am very grateful to Arthur Ripstein, Malcolm Thorburn, and the participants in a seminar at the Faculty of Law, Queen's University, March 2009.

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1. Introduction

What, if anything, does the idea of constitutionalism appropriate to a liberal-democratic state require of the positive law of private self-defence? Does the idea of constitutionalism have any bearing on the difficult questions that are hotly debated in the rich literature on self-defence? In this paper, I argue that the idea of a liberal democratic constitution imposes several requirements on the law of self-defence, though it also leaves considerable room for variation in doctrinal detail. To comply with the liberal-democratic constitution, the law of self-defence must not only comply with the usual criteria of validity but must also meet a test of substantive legality appropriate to the constitution. This idea is a familiar one in the context of laws that touch upon familiar civil and political liberties such as freedom of conscience and freedom of speech, but I suggest that it applies as well to the substantive criminal law, and in particular to the law of self-defence. Like a positive law touching on expression, the positive law of self-defence must be one that could not reasonably be rejected by a person who is a member of a civil condition created with the purpose of curing the insecurities of the state of nature. More specifically, the positive law must recognize a right of self-defence in the core case where the defender responds with necessary and proportionate force to a wrongful threat, and the positive law must also provide at least an excuse leading to acquittal where the defender is reasonably mistaken about one of the conditions in the core case. Furthermore, and perhaps more controversially, I argue that the positive law must acquit a person who uses necessary and proportionate force to repel an innocent

threat because a law defining this conduct to be a punishable wrong would have to be rejected by a prospective member of the civil condition.

2. The Idea of the Constitution and the Law of Self-Defence

In the liberal-democratic tradition, the purpose of the state is to cure the defects of the state of nature, through the enactment of positive law and the creation of effective institutions. The constitution is the basic norm that enables the creation of other norms, the positive laws that are the state's response to the defects of the state of nature. The constitution transforms a situation in which the rights of each individual are at the mercy of other individuals into a situation where legal institutions secure the rights of each, in several ways: by providing authoritative definitions of rights, by preventing violations of right, and by providing remedies in cases of violations of right. That is, the constitution transforms the state of nature into what I will call (following Kant) a civil condition.

It is very commonly held in this tradition that in the state of nature each person has a right of bodily integrity and therefore a right of self-defence, but there is nothing to stop each from exercising the right of self-defence as he or she sees fit, thereby quite possibly violating the rights of others. Put another way, the "right" of self-defence that everyone has in the state of nature is loosely defined, unenforceable, and unpunishable if abused. The civil condition is meant to cure this insecurity (among many others) by providing a framework for the enactment of laws governing the use of force and the creation of a set of public institutions through which those laws can be enacted and applied to prevent and to punish unlawful uses of force. But because individual members of the civil condition give up the rights, however ill-defined those may have been, that

they had in the state of nature, they must also be able to see themselves as authors of those laws through their participation in the process of law-making (for example, by their contribution to public debate and their participation in choosing a representative legislative body).¹

So, in the civil condition, the laws that govern individual behaviour must certainly meet whatever criteria of validity that are imposed by the institutions of the system; but they must also meet a criterion of substantive legality appropriate to a liberal-democratic legal order. They must be laws that the individuals acting together could give themselves; that is, they must, at a minimum, be laws that respect the personhood of each of the individuals who came together to make them because a law that does not meet this standard is one that a person could not reasonably agree to. In the civil condition, each person's liberty to act is limited by the laws to which each is subject, but those limits cannot themselves take away each individual's right to be treated by the legal system as an end in himself or herself; if they do, they are inconsistent with the criterion of substantive legality.² A law that is deficient in this respect is unconstitutional. Whether the institutions of any particular legal order provide a mechanism by which such unconstitutional laws can, as a matter of positive law, be invalidated is a further question. In some legal orders, the ordinary courts (as in the United States and Canada) or a constitutional court (as in France or Germany) may have the power to invalidate laws on

¹ Kant, *Metaphysics of Morals*, 312-216; Jürgen Habermas, *Between Facts and Norms*, William Rehg trans. (Cambridge, Mass.: The MIT Press, 1996), Chapter 4.

² Kant, *Theory and Practice*, 297-8; Habermas, p. 455.

various grounds including rights-based grounds resembling the criterion of substantive legality sketched here. In other legal orders, there may be no legal institution that has this power, but the idea of substantive legality can nonetheless condition the exercise of executive powers (such as the power to veto legislation) or the judicial interpretation of statutes (as has sometimes happened in the United Kingdom). But in all legal orders that derive their claim to authority from the liberal-democratic idea of the constitution, that is, that claim to govern the interaction of free persons, a law that does not meet this criterion, even if not formally invalid, will be substantively defective from a legal point of view.

This idea of substantive legality appropriate to a liberal-democratic state has usually been connected with political and conscientious freedoms such as the right of free speech, freedom of conscience, or with the protection of basic civil liberties.³ But it has implications for the content of the substantive criminal law as well. To the extent that the civil condition is meant to cure the insecurities of the state of nature associated with each person acting as he or she sees fit to protect his or her own rights, the civil condition must provide a criminal code that helps to define and to protect the basic rights to bodily integrity and property that, in the state of nature, were up for grabs. And it is this thought that I explore here in connection with the law of self-defence.

The right of self-defence plays an important role in the typical liberal depiction of the state of nature, but when writers in this tradition move to describing the civil condition, they generally have little to say about the features that the positive law of self-

³ Rawls, *Political Liberalism*; Dworkin, *Freedom's Law*; David Dyzenhaus, *The Constitution of Law* (Cambridge: Cambridge University Press, 2006)

defence should have. Kant has nothing to say on this point; in the *Rechtslehre*, he mentions the right of self-defence only once, in passing and by way of contrast with the defence of necessity.⁴ Pufendorf moves briskly from the state of nature to the civil condition and, while recognizing a private right of self-defence in the civil condition, apparently does not see any particular difficulties in specifying its content.⁵ Self-defence, understood as a private right to punish, looms large in Locke's discussion of the state of nature, but not in his account of the civil condition.⁶ And 20th-century contributors to this tradition rarely have much to say about substantive criminal law.⁷

Hobbes is, of course, an important exception. He held not only that the right of self-defence survived from the state of nature into the civil condition, but also that there was a sense in which the civil condition could not limit it at all. The right of self-defence in the state of nature was, in Hobbes's view, so strong that no-one could contract out of it, and this contractual disability applied even as against the sovereign's carrying out a death

⁴ Kant, *Metaphysics of Morals*, 235.

⁵ Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law*, James Tully, ed. & Michael Silverthorne trans. (Cambridge: Cambridge University Press, 1991), pp. 49-50.

⁶ Compare pp. 269-76 with pp. 352-60 of John Locke, *Two Treatises of Government*, Peter Laslett ed. (Cambridge: Cambridge University Press, 1988).

⁷ Rawls, Dworkin, and Habermas have little to say about the substantive criminal law and nothing to say about self-defence. But see Arthur Ripstein, *Equality, responsibility and the law* (Cambridge: Cambridge University Press, 1999), chapters 5-7; Sharon Dolovich, "Legitimate Punishment in Liberal Democracy" (2004) 7 *Buffalo Crim.L.Rev.* 307.

sentence according to law.⁸ The stringency of Hobbes's views on this topic raises many puzzles which I do not attempt to resolve here.⁹ But the very survival of this right from the state of nature into the civil condition is a puzzle in its own right. If we were to read Hobbes as holding that the right of self-defence survives in the civil condition simply because nothing can deter a person from exercising it, then he is not defining a right as much as he is recognizing an empirical fact about human nature. But that is not Hobbes's view: rather, he holds that the right of self-defence is inalienable:

A Covenant not to defend my selfe from force, by force, is always voyd. For ... no man can transerre, or lay down his Right to save himselfe from Death, Wounds and Imprisonment, the avoiding whereof is the onely End of laying down any Right, and therefore the promise of not resisting force, in no Covenant transferreth any Right; nor is obliging.¹⁰

That is, the assertion that individual persons gave up the right of self-defence in the transition from the state of nature to the civil condition would be inconsistent with the civil condition as a remedy for the deficiencies of the state of nature.

⁸ Thomas Hobbes, *Leviathan*, C.B. Macpherson ed. (Harmondsworth: Penguin, 1968), Chapters 14, 21.

⁹ For a very helpful discussion of these puzzles, see Alice Ristroph, "Respect and Resistance in Punishment Theory", forthcoming, (2009) California L.Rev.

¹⁰ Hobbes, p. 199.

If Hobbes's comments about self-defence are read in the context of his laying down the basics of a constitutional legal ordering,¹¹ then they reflect the idea that the constitution limits the power of the legislature or the courts to interfere with the right of self-defence. On this reading, Hobbes provides an important clue about what happens to the right of self-defence in the transition from the state of nature to the civil condition. Once the civil condition is in place, the legislature cannot rightfully abolish the private right of self-defence, say by explicitly stating in the criminal code that there is no such right; it cannot rightfully say to individual citizens that they no longer have a private right of self-defence even if the state undertakes to protect them. To be sure, the right of self-defence in the civil condition does not have the same content as the right of self-defence in the state of nature; it is no longer a right to act as one sees fit in defence of one's bodily integrity. But the constitution, far from permitting the abolition of the right, ensures that it cannot be eliminated altogether. In the next section, I outline a core case in which it would be unconstitutional for the legislature to remove the right of self-defence, and I consider ways in which the legislature may limit the right. The right of self-defence survives from the state of nature into the civil condition in a modified form.

3. Self-Defence: Cases and Problems

The law of self-defence: The core case

Consider the following facts:

¹¹ Compare David Dyzenhaus, "Hobbes and the Legitimacy of Law" (2001) 20 Law & Philosophy 461.

- (1) Albert is physically threatened by Brian.
- (2) Brian's threat to Albert is unlawful, *i.e.*, an unjustified assault.
- (3) Brian's threat, if unchecked, would kill Albert.
- (4) The only way that Albert can prevent Brian's threat from killing him is to kill Brian.
- (5) Albert and Brian are both fully aware of facts (1) through (4).
- (6) Albert kills Brian.
- (7) Albert's purpose in killing Brian was to save his own life.

I will call the combination of these seven facts the core case of self-defence. Liberal-democratic legal systems are remarkably consistent about the proper treatment of the core case: they all regard it as a case in which Albert is legally justified in killing Brian.¹²

There is good reason for this uniformity: the criminal law of a liberal-democratic state could not, consistent with the state's own constitutional norms, take away or even limit the right of self-defence in the core case. The purpose of the civil condition is to cure the defects of the state of nature, to provide a legal regime and a set of institutions in which each can enjoy his or her rights. In entering into the state of nature, individuals do indeed give up a great deal of liberty of action, including the liberty to act as they see fit in enforcing their rights, including the right to bodily integrity, and in doing so, they give

¹² See, for example, Model Penal Code, §§3.04, 3.09; *Criminal Code*, R.S.C. 1986, c. C-46, s. 34(2); Code Pénal, art. 122-5. Under all of these statutes, Albert is justified in the core case.

up their “wild, lawless freedom”¹³ in exchange for freedom under law, the liberty of each to do what he or she wishes within a system of mutual restraints on that liberty.¹⁴ So the legislature can and should establish a criminal law that structures and thereby limits the private right of self-defence. But in the core case, the institutions of the civil condition cannot protect Albert. To impose criminal liability in this situation—to punish him for acting in defence of the very rights that the civil condition was designed to protect, in the exact situation where the civil condition cannot protect him—would be inconsistent with the purpose of having a civil condition. Put another way, a private right of self-defence in a situation where the state cannot protect the defender can be, indeed must be, part of the mutual limits on freedom created by the civil condition because a law that abolished that right would require submission to unlawful, fatal violence, that is, require Albert to treat himself as a mere means to whatever purposes Brian is trying to achieve through his unlawful attack. This legal demand would be inconsistent with the personhood of the members of the civil condition. So it would be inconsistent with the constitution for the legislature¹⁵ to take away the right of self-defence in the core case.

A law abolishing the right of self-defence in the core case is not a law that the people, acting together through their legislative institutions, could give themselves because it would be inconsistent with the personhood of each member of the civil

¹³ Kant, *Metaphysics of Morals*, 316.

¹⁴ Kant, *Metaphysics of Morals*, 229-233.

¹⁵ Or the courts, to the extent that the existence of the defence depends on the continued application of principles derived from cases.

condition. It would punish members of the civil condition for protecting their personhood from wrongful attacks when the institutions of the civil condition cannot, in other words, for doing precisely the job that the civil condition is supposed to do but, in the circumstances, cannot.

But the existence of the civil condition also explains why the positive law of self-defence is not simply a right to respond to threats as one sees fit, that is, why the positive law is more restrictive than the right of self-defence in the state of nature. In particular, it explains condition (4), that is, the requirement that Albert's deadly response be the only way he can preserve himself. The positive law of self-defence must insist on this requirement because it reflects the fact that both Albert and Brian are no longer in a state of nature but are members of the civil condition.¹⁶ First of all, the civil condition may itself provide alternatives to the use of deadly force. If, somewhat implausibly, Brian happens to assault Albert in front of a police officer who can prevent the assault without killing Brian, then Albert should not act on his own but should allow the officer to restrain Brian. In this scenario, Albert should avail himself of an institution that was unavailable in the state of nature. Second, even where Albert cannot invoke the preventive machinery of the civil condition, the requirement that Albert's deadly use of force be necessary to repel Brian's assault reflects the fact that Albert and Brian are both members of the civil condition, which is designed to secure the rights of both of them.

¹⁶ Or, at least, they are governed by it. If one or both of them is not a citizen of the particular legal order that governs their encounter, then they are not both members of that civil condition; but strangers have the same right to the basic criminal law protections of the civil condition as citizens.

The laws of the civil condition can legitimately ask Albert not to impinge on the interests of Brian that are protected by the civil condition more than is required for the protection of Albert's right; so if Albert can prevent Brian's assault without killing him, he should do so. Thus, condition (4) reflects the innate right of both Albert and Brian to bodily integrity¹⁷ and is therefore required for the justification in the core case to succeed.

Moreover, although Brian's situation is unsympathetic one, he (or his estate) might well object on constitutional grounds to a legislative or judicial redefinition of the core case that omitted condition (4) and permitted Albert to respond with deadly force even if such a degree of force was not required.¹⁸

¹⁷ Kant says that in the case of "a *wrongful* assailant upon my life whom I forestall by depriving him of his life ... a recommendation to show moderation ... belongs not to right but only to ethics." Kant, *Metaphysics of Morals*, at 235. This comment is puzzling. If Kant refers to the scenario in which Albert can only preserve himself by killing Brian, then Kant's view must be that neither law nor ethics would not recommend moderation, as allowing oneself to be wrongfully killed would be a form of suicide inconsistent with one's duty to protect one's humanity in one's own person whether that duty is understood legally or ethically. But if Kant refers to the scenario in which Albert could avert the assault without killing Brian, then his deferral of moderation from law to ethics is harsh even by the standards of Kant's legal philosophy. My argument in the text is meant to provide a Kantian explanation of why, in the latter scenario the recommendation to show moderation would indeed belong to law and not only to ethics.

¹⁸ Constitutional challenges to the elements of defences by victims or potential victims are rare, but have occurred under the Canadian Charter of Rights and Freedoms: see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 (a challenge, brought on behalf of children, to a law permitting corporal punishment; although the challenge failed, the court recognized that withdrawing the protection of the criminal law engaged children's constitutional rights); *R.*

The law of self-defence: beyond the core case

The widespread agreement in the positive law about the proper outcome of the core case dissipates rapidly beyond the core case. The possible variations on the core case, considering both possible factual differences and the mistakes that either Albert or Brian might make about the facts, are legion,¹⁹ and I will not attempt to discuss all of them here, much less argue that the idea of the constitution dictates a solution to each one. But it will be useful to consider four particularly important variants. The first involves a reasonable mistake by Albert; the second involves Albert's use of disproportionate force; the third involves a third party; and the fourth involves an innocent attacker.

First variant: putative self-defence

In the first variant, Albert wrongly but reasonably believes that he must kill Brian to preserve himself. There are various ways in which this mistaken belief could arise. I focus on the type of case where Brian is wrongfully attacking Albert but creates no serious danger; nonetheless, some features of the attack leads Albert wrongly but reasonably to believe that Brian's attack does threaten his life, and therefore to respond

v. Lines, [1993] O.J. No. 3284 (Gen.Div.) (QL) (at the start of the trial of a police officer charged with offences arising out of the shooting of a suspect, the prosecution brought a constitutional challenge to a statutory version of the "fleeing felon" rule, on which the accused might have relied during the trial; the challenge succeeded).

¹⁹ For an effort to deal with a very large number of variants, see Boaz Sangero, *Self-Defence in Criminal Law* (Oxford: Hart, 2006); for a more focused and restrained effort, see Fiona Leverick, ***.

with deadly force. If he knew all the facts, Albert would, as a reasonable person, recognize that the attack is not life-threatening, indeed not particularly dangerous, and would respond in some other way.²⁰ Brian might, for example, threaten to shoot Albert with a firearm that is in fact unloaded. This threat would amount to a wrongful act in most jurisdictions (it is an assault under Canadian law), but does not in fact pose any threat to Albert's bodily integrity and could safely be ignored. But unless Albert knew that the firearm was unloaded, he would reasonably believe that his life is in danger. So we change conditions (3) and (4) and the beliefs associated with them as follows:

(3a) Albert believes that Brian's threat, if unchecked, would kill him, and

(4a) Albert believes that the only way that he can prevent Brian's threat from killing him is to kill Brian.

(5a) Albert's belief that conditions (3) and (4) are present is mistaken but reasonable.²¹

This type of variation has attracted considerable scholarly discussion. The weight of opinion is probably to the effect that Albert's conduct is wrong in law but excused.²² But

²⁰ In another variant, Brian's attack would be deadly if unchecked, but Albert makes a mistake about condition (4): he wrongly believes that only deadly force will repel the attack.

²¹ As far as I can see, nothing in what follows turns on Brian's knowledge of whether the weapon is unloaded.

some scholars maintain that even if Albert's conduct is wrong all things considered from an extra-legal point of view, the law must treat it as justified.²³ Other scholars think that he ought to be acquitted, and it doesn't matter whether we describe his act as justified or excused.²⁴ And, generally speaking, the criminal law of liberal-democratic states take the second or third view.²⁵

²² See, among others, George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1979) at pp. 762-9; John Gardner, *Offences and Defences* (Oxford: Oxford University Press, 2007) at pp. 91-139; Suzanne Uniacke, *Permissible Killing*. (Cambridge: Cambridge University Press, 1994) at pp. 39-41; Brudner; Leverick, pp. ***.

²³ Hamish Stewart, "The Role of Reasonableness in Self-Defence" (2003) 16 *Canadian Journal of Law and Jurisprudence* 317; Joshua Dressler, "New Thoughts about the Concept of Justification in Criminal Law: A Critique of Fletcher's Thinking and Rethinking" (1984) 32 *ULCA L.Rev.* 61.

²⁴ J.C. Smith, *Justification and Excuse in the Criminal Law* (London: Stevens, 1989) at p. 12; Don Stuart, *Canadian Criminal Law: A Treatise*, 5th ed. (Toronto: Carswell, 2007) at pp. 469-72. This understanding of putative self-defence is also implicit in Thorburn's approach, since he sees the court's role not as deciding whether the accused's conduct was justified (or excused) according to the relevant norm (whatever that norm is), but whether the accused validly exercised the power of self-defence granted to him or her by the statute. Thorburn, pp. 1125-30. On this view, the accused is entitled to be acquitted if he or she has validly exercised the power of self-defence, whether or not a court or an external observer would conclude that his or her act was justified all things considered.

²⁵ Under the Model Penal Code and under the doctrine in *R. v. Beckford*, [1988] A.C. 130, Albert's mistake need only be honest to resulting an acquittal. Under *Criminal Code*, s. 34(2), Albert's belief in the justifying conditions must be based on reasonable grounds.

What, if anything, does the constitution require of the law in this variant? The debate on whether Albert's conduct in the first variant is excused or justified usually turns on a more general debate about whether conduct is legally justified only if it the right thing to do all-things-considered, or if it may also be justified if objectively appears to be the right thing to do. On the former view, Albert's conduct is merely excused because, all things considered, Albert should not have killed Brian because Brian was not in fact threatening his life. On the latter view, Albert's conduct is justified because it reasonably appeared to be the right thing to do.

The idea of the constitution is not powerful enough to distinguish between these two views; both are adequate to the idea of a legal order that cures the deficiencies of the state of nature. But the idea of the constitution does tell us that Albert is entitled to be acquitted in this variant; in other words, the constitution requires the positive law to treat Albert's conduct as either excused or justified. The second possibility obviously presents no difficulty; if he is justified, he cannot be held criminally liable for his conduct because it was legally permitted or required. The first possibility turns on the legal concept of reasonableness. The role of the concept of reasonableness in the legal system is relatively clear. The precise content of the concept of reasonableness is much debated,²⁶ but what

²⁶ See, among many other contributions, Ripstein; John Gardner, "The mysterious case of the reasonable person" (2001) 51 *University of Toronto Law Journal* 273; Mayo Moran, *Rethinking the Reasonable Person* (Oxford: Oxford University Press, 2003). For Ripstein, reasonableness is a political idea; for Gardner, it is a moral and cognitive idea; for Moran, it is a legal and cognitive idea; for all three, its content informs the construction of legal norms.

is most relevant here is not its content but its role in the law of self-defence. When a private person, or indeed a public official, acts reasonably, he or she has done no less than what the legal system expects of him or her in doing something that the law requires (or preventing an occurrence that the law wishes to avoid) even if, perhaps, he or she could have done more. A person who has used reasonable care to prevent an accident is typically not civilly responsible for it, even if he could have done more to prevent it; the decision of an arbitrator who has reasonably resolved the dispute before her should be upheld, even if other resolutions were legally possible or even preferable; and a person who reasonably believes in facts that would make his conduct non-criminal is entitled to an acquittal, even if he could have investigated the facts further.²⁷ So to say that Albert is reasonably mistaken in believing that Brian was about to kill him, and responded accordingly, is simply to say that he has done as much as the law could expect of him. From the point of view of the reasonable person in Albert's position at the time of Brian's attack, the circumstances of the first variant are indistinguishable from the core case. In these circumstances, he cannot be punished; to punish him for acting in self-defence on the basis of facts which, as he reasonably perceives them, are indistinguishable from those of the core case would tend to undermine the right of self-defence in the core case itself, and thus would be inconsistent with the constitutional status of the right of self-defence in the core case.

²⁷ The positive law of the Anglophone countries contains various exceptions to these general principles; liability in tort, for example, is often strict. Whether those exceptions can be justified is a discussion for another time.

To put the point another way, there is always a risk of error in cases of self-defence. There is always a possibility that the facts are not as they appear to Albert, and to punish him for acting on the reasonable appearance of a deadly attack would be unfair to him as it would impose all the risk of error on him.

Second variant: Disproportionality

The core case involves a life for a life; the injury to Brian is equivalent to the injury he would have inflicted on Albert. In the second variant, we depart from this equivalence and thereby introduce the issue of proportionality. Assume that the threat to Albert is not mortal, but Albert responds to the threat with lethal force, and that there is no other way to repel it. The force used is necessary in the sense that Albert will have to submit to Brian's assault if Albert does not use it, but the effect of the force is arguably disproportionate to the threat averted. Albert cannot repel the threat without killing Brian, but Brian's death is a greater harm than the injury that Brian would have inflicted on Albert. This variation involves changing the three conditions:

(3b) Brian's threat, if unchecked, would not kill Albert but would wrong (and possibly harm) him.

(4b) The only way that Albert can prevent Brian's threat from wronging him is to kill Brian.

(7b) Albert's purpose in killing Brian was to preserve himself from the wrong (and possible harm) that Brian would have done to him.

I leave open for the moment the question of how much the attack would harm Albert. At one extreme, the attack might be a harmless wrongdoing, such as an unwanted touching that neither hurt nor injured Albert and had only a minimal effect on Albert's dignity; at the other extreme, the attack might result in serious physical or dignitary injury, such as loss of a limb or a serious sexual violation.

The positive law of contemporary liberal-democratic states is not uniform with respect to proportionality. Proportionality is explicitly required in some positive legal orders, as in France, where the right of self-defence is limited to means that are not disproportionate to the seriousness of the attack.²⁸ Other legal systems are not so sure that proportionality is required. The *Criminal Code* of Canada does not speak expressly to this issue,²⁹ and Canadian courts and commentators are divided.³⁰

²⁸ Code pénal, art. 122-5 (the use of defensive force is not justified where there is “disproportion entre les moyens de défense employés et la gravité de l'atteinte”).

²⁹ Some of the self-defence provisions of the *Code* do speak of proportionality; see, for example, s. 37(2). But other major self-defence provisions do not. Section 34 of the *Code*, which defines two forms of self-defence frequently seen in practice, asks whether Albert's response is “no more than necessary” (s. 34(1) or whether Albert could “not otherwise preserve himself” (s. 34(2)).

³⁰ Some commentators take the statutory wording to mean that there is no proportionality requirement (Stuart, p. 511), and the Supreme Court of Canada sometimes seems to agree. In *R. v. Hebert*, [1996] 2 S.C.R. 272, at para. 16, the court commented that “it is not a requirement of s. 34(2) that the force used must be proportionate to the assault against which the accused is defending him-or herself”. But the general tenor of the reasoning in *Hebert* is seriously at odds with the court's earlier decision in *R. v. Brisson*,

This uncertainty may flow from a tension between two aspects of the way in which the civil condition remedies the defects of the state of nature. The law of self-defence is supposed to recognize Albert's right of self-defence in a context where he and Brian are both members of the civil condition. It does so by protecting the right of each of them to his bodily integrity: it protects the right but it also protects the body. One might argue, emphasizing the right, that Brian has nothing to complain of if the force Albert uses "is no more than is necessary to enable him to defend himself",³¹ *even if* that degree of force causes disproportionate injury to the victim; after all, it is Albert's rights that are at stake here, and surely he is entitled to stand on them. Moreover, it is clear that if there is a requirement of proportionality, it clearly does not apply in a simple numerical way: if Albert is wrongfully attacked by two Brians, or by ten Brians, and all the other conditions of the core case are present, he is certainly entitled to kill them all. Similarly, if there is a requirement of proportionality related to the degree of injury, it is not strict, in the following sense: proportionality does not require Albert to submit to a serious injury rather than use deadly force in repelling Brian's attack. It requires, at most, that Albert's response not be grossly disproportionate to the attack.

[1982] 2 S.C.R. 227, where it was held that excessive use of force in response to a wrongful threat deprives the accused of right of self-defence. These two cases are both interpretations of the same statutory provision, but *Hebert* does not mention *Brisson*. Moreover, in a decision that is likely to be influential, a provincial appellate court has approved a jury instruction emphasizing the proportionality of the accused's response to the threat posed by his assailant: *R. v. Walker* (2007), 217 C.C.C. (3d) 254 (B.C.C.A.). It is difficult to reconcile this approval with *Hebert*.

³¹ *Criminal Code*, s. 34(1).

On the other hand, one might argue, emphasizing the body, that even where Brian is undoubtedly in the wrong, the civil condition requires Albert to continue to respect Brian's bodily integrity. As we saw in the core case, the law must demand that Albert use no more force than is necessary. Similarly, the demand that Albert not inflict an injury on Brian that is disproportionate to the threatened assault might reflect the same concern for Brian's rights in the civil condition.

What, if anything, does the constitution demand here? Does it, for example, forbid the legislature from imposing a requirement of proportionality? Since the purpose of the constitution is to secure the rights of each, not the welfare of each, one might think that individuals should be constitutionally entitled to use any degree of force that is necessary to repel a threat of any violation of right: if killing Brian is the only way that Albert can prevent him from patting him on the back without his consent, then he is permitted to kill; requiring Albert to submit to unwanted touching would be to reduce him to the status of a thing for Brian's use. The reluctance of actual liberal-democratic orders to make this extreme rule part of the positive law of self-defence,³² though not decisive, should make us pause before accepting the extreme rights-protecting solution. Although Brian is in the wrong when he attacks Albert, they are both members of the civil condition and each is entitled to have the other consider the effects of the other's action on his personhood. If the wrong that Brian threatens to do to Albert does not seriously affect Albert's personhood—if it is, for example, a harmless though unwanted

³² Even in Canada, where proportionality is arguably not a requirement of self-defence where the accused is threatened with death or grievous bodily harm, it is a requirement in the face of lesser threats.

touching—then the positive law of self-defence may require him to limit his response to methods that will not seriously affect Brian’s personhood either. So if Brian tries to pat Albert’s back without Albert’s consent,³³ Albert may try to push Brian away, but may not kill him; if he can’t avert the unwanted pat by a simple push, then he has to submit to it. On the other hand, if the attack poses a serious threat to Albert’s continued personhood, then Albert’s response may be much stronger. If Brian’s attack threatens to maim Albert, Albert may respond with deadly force.

The attraction of this form of proportionality requirement is reinforced by the ever-present possibility of error. It is always possible that Albert is mistaken in his belief that Brian is about to touch him without his consent. In this scenario, to allow Albert to respond with any degree of force he reasonably believes is necessary to protect his right to bodily integrity would put all the risk of error on the unfortunate and factually innocent Brian, and all others who find themselves in a similar situation. Requiring proportionality is a way of fairly dividing the risk of error in situations of putative self-defence.

Thus, the requirement of proportionality is a constitutionally permissible feature of the right of self-defence. In the state of nature, there is of course no notion of proportionality because there is no restraint whatsoever on the right of each to act in self-

³³ There may be situations, particularly sporting events and social occasions, in which Albert has given implied consent, or is deemed to have consented, to certain touches or even attacks, even though he does not consent to any particular physical contact. I assume that Albert and Brian are not in one of those situations.

defence; but in the civil condition, the right of each to act in defence of his or her bodily integrity is constrained by the rights of others to their bodily integrity.

Third variant: Defence of others

Suppose that Albert is acting not to protect himself but to protect Charles, an innocent third party. (I put aside the question of whether Albert has a legal duty to protect Charles.) So we change the core case as follows:

- (1c) Charles is physically threatened by Brian.
- (2c) Brian's threat to Charles is unlawful, *i.e.*, an unjustified assault.
- (3c) Brian's threat, if unchecked, would kill Charles.
- (4c) The only way to prevent Brian's threat from killing Charles is for Albert (or Charles) to kill Brian.
- (5c) Albert and Brian are both fully aware of facts (1c) through (4c).
- (6) Albert kills Brian.
- (7c) Albert's purpose in killing Brian was to save Charles's life.

In this case, Albert is exercising Charles's right of self-defence—the right that Charles would have in the core case—on Charles's behalf. Here, as in the core case, the positive law of liberal-democratic states is quite consistent: Albert is justified in killing Charles.³⁴

³⁴ Compare *Criminal Code*, s. 37; MPC, s. 3.05(1); Code pénal, art. 122-5.

To understand why the positive law permits this private use of force, it is helpful to consider Thorburn's claim that all legal justifications, including justifications available in the substantive criminal law, "involve the exercise of a legal power – an authoritative decision by the appropriate person that a certain course of action is justified under the circumstances."³⁵ Thorburn claims that, in this variant, the law authorizes Albert to exercise a public power—the power to prevent Brian's wrongful attack on Charles—in a situation where appropriate public officials are unable to do so.³⁶ This claim fits well with the approach proposed here. The institutions of the civil condition, being unable to do their job of protecting Charles from Brian's wrongful attack, cannot complain if Albert takes that job upon himself. But even if Thorburn's account of the structure of justifications is generally correct, it would be a mistake to infer from that structure that the legislature could define the justification—the public power, in Thorburn's view—however it likes. Put another way, it would be a mistake to infer from the structure of Albert's justification in the third variant that analyzing Charles's right of self-defence, or indeed Albert's right of self-defence in the core case, as the exercise of a public power (as Thorburn argues³⁷), provides a complete understanding of the right. The power that

³⁵ Malcolm Thorburn, "Justifications, Powers and Authority" (2008) 117 Yale Law Journal 1070 at p. 1074.

³⁶ *Ibid.* at pp. 1107-1110.

³⁷ Thorburn argues that in self-defence, "The decision-making authority of ordinary citizens is derived *entirely* from their role as stand-ins for public officials who are unable to make those decisions themselves." (p. 1118, emphasis added; compare p. 1126.)

Albert exercises is a power to protect Charles's private right of self-defence; the power that Albert exercises in the core case is a power to protect his own private right of self-defence. If, as I have argued, the constitution requires the positive law to preserve the right of self-defence in the core case, then the power that Thorburn describes is one that the positive law is required to provide.

Fourth variant: Innocent attacker (defensive necessity)

The problem of the innocent attacker is one of the most difficult in the law of self-defence,³⁸ so much so that some commentators prefer to treat it under a different heading (*e.g.*, as an aspect of the defence of necessity or in a category of its own such as defensive necessity). The source of the problem is clear: if Brian does no wrong in threatening Albert's life, how can it be right for Albert to respond to him with deadly force? In this situation, whether Albert defends himself or not, an innocent person is going to die.

There are many ways in which the problem of the innocent attacker can arise. Brian might not himself be a threat but be inextricably connected to a wrongful threat (*e.g.*, a passenger in a hijacked airliner), so that Albert cannot respond to the wrongful threat (as he would normally be entitled to do) without also killing Brian.³⁹ Brian might

³⁸ Compare, among other discussions, Jeff McMahon, "Self-Defense and the Problem of the Innocent Attacker" (1994) 104 *Ethics* 252; Yitzhak Benbaji, "Culpable Bystanders, Innocent Threats and the Ethics of Self-Defense" (2005) 35 *Canadian Journal of Philosophy* 585.

³⁹ I do not rely on the doctrine of double effect to resolve this problem. If Albert knows that he will kill Brian in repelling the wrongful threat, then he intends Brian's death for criminal law purposes.

attack Albert on the basis of a delusional belief that would, if he harmed Albert, relieve him of criminal responsibility. Brian might be a child who has no idea that his conduct poses a threat to Albert and is below the age at which he might be found criminally liable for that conduct. Brian might, unwillingly, by pure happenstance, and through no wrongdoing whatsoever, be a human projectile that will kill Albert if Albert does not kill him first.⁴⁰

It may be possible to draw distinctions among these cases. Alan Brudner suggests that the attacker who acts voluntarily but non-culpably (the delusional threat, the child) wrongs Albert, so that Albert is entitled to act in self-defence, whereas the involuntary attacker—the passenger in the doomed aircraft or the human projectile—does not act at all and so does not wrong Albert.⁴¹ But however we characterize the movements of Brian’s body, those movements non-culpably threaten Albert’s life;⁴² so it might be argued that either he does not wrong Albert in any of these cases or he wrongs Albert in all of these cases. His non-culpability means that his body has become a thing that threatens Albert, like a natural event such as tree that is about to fall on him or a torrent that is about to sweep him away. There is no question that Albert would be legally permitted to respond to the natural event with whatever force was necessary to preserve

⁴⁰ This “human projectile” hypothetical appears to have originated in Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), p. 34.

⁴¹ Alan Brudner, *Punishment and Freedom* (OUP, 2009), chap. ***.

⁴² Compare Judith Jarvis Thomson, “Self-Defense” (1991) 20 *Philosophy and Public Affairs* 283 at pp. 298-303.

himself; the difficulty with allowing such a response in the case of defensive necessity is that a wholly innocent person will die.

Of course, there may well be people behind these events who bear legal responsibility for them, so that they are no longer considered natural events for legal purposes. But that is true of Brian as well; if he bears some legal responsibility for getting himself into the delusional state that results in his threatening Albert, then he is no longer a wholly innocent threat.⁴³ Assuming that Brian bears no responsibility for turning himself into a delusional threat or a human projectile, he is equally innocent in both cases.

But even if I am wrong about this—if it is in fact useful to further distinguish these cases—they nonetheless have a common element that is worth exploring: in all of these cases, both Brian and Albert are innocent, so, whatever happens, the life of one innocent will be saved at the expense of another innocent. So I change only condition (2):

(2d) Brian's threat to Albert, though not rightful, is non-culpable.

⁴³ In Anglo-American law, a person who knows he suffers from episodes of irresponsibility and does not exercise reasonable control over them is, if he kills someone during one of those episodes, likely guilty of manslaughter; similarly, an employer who does not exercise reasonable care over dangerous working conditions is likely guilty of manslaughter if an employee dies as a result.

Continue to assume Albert knows all the relevant facts; in particular, he knows that Albert is legally irresponsible and thus that he is killing an innocent. (Nothing turns on whether Brian knows the relevant facts. In some cases he clearly does not, *e.g.*, where he is a delusional attacker. But even if he does, as might happen in the case of the hijacked airliner, I will assume that there is no way he can act on his knowledge.)

Can it be said that Albert has a justification in this situation? The argument would have to go something like this. The right of self-defence, as a right of self-preservation, does not depend on whether the threat to one's life is guilty or innocent; to deny the right of self-defence in either case would be to subordinate oneself to the ends of others in a way that is inconsistent with understanding the law as a system of right. This argument, though plausible in the core case, seems hard to sustain in the case of an innocent threat, since the innocent threat can make the same claim with equal force: to allow Albert to act in self-defence is to subordinate Brian's very existence to Albert's end (survival); moreover, when his body is an innocent threat, Brian is not acting, that is not pursuing any end in particular, so it is not a case of Brian's ends against Albert's survival, but simply a case of survival against survival: life against life. Thus, the view that Albert's conduct is wrong but excused seems more plausible.

But if the claim that Albert's conduct was justified seems too strong, the claim that his conduct is merely excused seems too weak. Brian may be an innocent threat, but if Albert does nothing, he will become an innocent victim. He is in no way at fault in bringing on the threat, and if he allows himself to be killed, he will have allowed his own personality to be extinguished in order to preserve Brian's. While it is tempting to say that Albert would act wrongly in killing Brian because Brian is innocent, it is equally

tempting to say that allowing Brian's body to kill Albert would be wrong because Albert is innocent. The only difference between Albert's situation and Brian's is that Albert has the ability to act in self-preservation, while Brian does not. But there does not seem to be any reason why this fact puts him in the wrong.

Thus, the case of the innocent attacker is not aptly described with the language of excuse or the language of justification. Albert's conduct in killing Brian is neither justified nor excused. And if Brian were able to respond, if he were able to ward off the mortal threat posed by Albert's defensive measures, he would equally be in this no-man's-land between justification and excuse. I do not mean to say that Albert and Brian find themselves in the state of nature, that their conduct is not governed by law, because the other requirements of the positive law of self-defence continue to apply to both of them. If, for example, condition (4) is varied to that Albert can deflect the threat that Brian's body poses without killing Brian, then he should do so. It would be wrong for Albert to kill Brian when he was able to protect himself by other means. But if the situation really is one of innocent life for innocent life, the positive law of the civil condition cannot condemn one of the innocents for saving himself at the expense of the other.

Thus, as in the case of putative self-defence, granting Albert anything less than a complete acquittal would be inconsistent with the idea of the constitution. The legal system cannot expect Albert to act otherwise when faced with a threat to his life, even an innocent one. This is not because Albert displays some kind of moral weakness in preferring his life to Brian's. Nor is it because he will inevitably prefer to save his life now than to face punishment, even capital punishment, later. Rather, it is simply because

Albert has done no wrong in taking Brian's life—just as Brian was doing no wrong to Albert. The positive law of the civil condition cannot require either of them to subordinate his continued personhood to the continued personhood of the other.

It appears, somewhat unexpectedly, that this view may have been shared by Kant. Consider the following well-known passage from the *Vigilantius Lectures*:

... two men are trying to get hold of a plank, to save their lives from shipwreck; so long as neither has possession of it, it amounts, in effect, to the right of the stronger, but nor is there yet any question here of a collision of rights; once the plank has been commandeered, ... the other cannot throw his rival off it *in statu naturalis* [the state of nature]. Yet *in statu civili* [the civil condition] ... the agent cannot be punished, because there is no law that might enjoin omission of the action *cum effectu* [effectively]; for to punish with death a man who can save his own life no otherwise than by the loss of the other's life, is merely to leave open to him the choice between two kinds of death; either he chooses death in sparing the other's life, and here it is certain; or he takes the other's life in preserving his own, and subjects himself to the rigour of the law; he will do the latter. since perhaps he can escape the consequences by flight.⁴⁴

⁴⁴ Immanuel Kant, *Lectures on Ethics*, Peter Heath and J.B. Schneewind, ed.; Peter Heath, trans. (Cambridge: Cambridge University Press, 1997), 27:599-60.

Kant's argument that the person who wrongfully kills another is culpable but unpunishable (that is, excused) is well-known and much-discussed,⁴⁵ and so has perhaps overshadowed his startling claim that where neither person has claimed the plank, neither is in the wrong in seizing it before the other does, or even in fighting over it,⁴⁶ so that in this case might makes right (the right to the plank is "the right of the stronger").⁴⁷

Now, the first plank case is different from the case of an innocent threat: in the plank case neither of the two men is initially a threat to the other; rather, each is potentially an obstacle to the other's saving himself. But in both cases, only one of the two can be saved, and the positive law—the rules and principles that govern the interaction of free and purposive beings in the civil condition—cannot say anything about who has a right to survive. It cannot define the right in this situation. Indeed, since Kant is prepared to say that might makes right in the case of two men fighting for survival, he might well be prepared to say that might makes right in the case of an innocent threat. But I do not go that far; I claim only that in the innocent threat variant, the law cannot condemn Albert (or Brian, for that matter) for killing Brian to save himself.

⁴⁵ The argument is restated in Kant, *Metaphysics of Morals*, at 235-6; see also Dennis Klimchuk, "Necessity, Deterrence, and Standing" (2002) 8 *Legal Theory* 339; Arthur Ripstein, "In Extremis" (2005) 2 *Ohio State Journal of Criminal Law* 415.

⁴⁶ Kant, *Lectures on Ethics*, 27:515.

⁴⁷ See also Kant, *Lectures on Ethics*, 27:514.